Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 2003

ANHEUSER-BUSCH, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board's ("Board") determination that an employee's right to a union representative during a disciplinary interview, pursuant to the Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), includes the right to select a particular representative is consistent with Section 7 of the National Labor Relations Act, 29 U.S.C. § 157?

2. Whether the Board's determination that an employee's right to select a particular union representative in the course of a *Weingarten* interview fails to adhere to its prior decisional law and is an abuse of discretion?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Anheuser-Busch, Inc. states that Anheuser-Busch Companies, Inc. is its corporate parent. Anheuser-Busch Companies, Inc. is a publicly held company and holds at least 10% or more of Petitioner Anheuser-Busch, Inc.'s stock. No other publicly held company owns 10% or more of Anheuser-Busch, Inc.'s stock.

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No: _____

In the

Supreme Court of the United States

October Term, 2003

ANHEUSER-BUSCH, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Anheuser-Busch, Inc. ("ABI") prays that certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 1, 2003 and its denial of ABI's petition for rehearing en banc on September 29, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at 338 F.3d 267 and in the appendix hereto (A-1). The United States Court of Appeals for the Fourth Circuit's denial of ABI's petition for rehearing

en banc was not published and appears in the appendix hereto (A-98).

The opinion of the National Labor Relations Board ("Board"), dated December 19, 2001, appears at 337 NLRB No. 2 and in the appendix hereto (A-38). The Board's Order, dated July 5, 2002, granting in part and denying in part ABI's motion for reconsideration appears at 337 NLRB No. 121 and in the appendix hereto (A-89).

CONCISE STATEMENT OF JURISDICTION

Subject matter jurisdiction is pursuant to 29 U.S.C. § 160(f). ABI brought a petition for review of a Decision and Order of the Board, dated December 19, 2001, and its Order Granting in Part and Denying in Part Respondent's Motion for Reconsideration, dated July 5, 2002.

The Court has jurisdiction over this petition for writ of certiorari pursuant to 28 U.S.C. § 1254.

PROVISIONS INVOLVED

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

STATEMENT OF THE CASE

ABI operates twelve breweries throughout the United States. (A-42). At the Baldwinsville, New York brewery, where the events at issue occurred, the employees are jointly represented by the Brewery Conference of the International Brotherhood of Teamsters Union and Teamsters Local 1149. *Id.*

On December 15, 1998, an outside contractor reported to brewery management that employee Patrick Lamirande ("Lamirande") had been interfering with its construction work being done at the brewery. (A-46). As described below, ABI convened an investigatory meeting with Lamirande on December 16, 1998 and then again on December 17, 1998. (A-47-51).

A. The Events of December 16, 1998.

At about 11:15 a.m. on December 16, 1998, Supervisor Mark Burlingame ("Burlingame") attempted to interview Lamirande regarding the allegations. (A-47). At the time, there were two shop stewards, Fred Vogel ("Vogel") and Dan Finn ("Finn"), elected by the bargaining unit to represent employees in the Beer, Packaging and Shipping department ("BP&S"). (A-46). Vogel and Finn were equally competent in performing their duties as steward. *Id.* Vogel, like Finn, was "duly elected to the steward position by the workers and was experienced in the job." (A-53).

Upon being approached by Burlingame, Lamirande requested union representation, and, while the record is

unclear as to when he did so,[1] he specifically requested Finn. (A-47-48). Burlingame summoned Vogel, because he reasonably believed that Finn was at lunch. (A-52). The Administrative Law Judge ("ALJ") found that ABI's decision to summon Vogel rather than Finn was for a "logical reason" and not made for any ulterior motives. (A-52).

When Vogel arrived, Lamirande told Vogel, "'No offense against you Fred, but I would like to see Dan Finn because he is aware of my situation.'" (A-48). Apparently Lamirande preferred Finn because he "personally believed Finn to be a better steward." (A-46). After Burlingame explained the allegations to Vogel, Lamirande "steadfastly" refused to answer ABI's few questions, and the interview ended. (A-48-49). There was "no question" in the ALJ's mind that Vogel adequately represented Lamirande on December 16th. (A-53).

B. The Events of December 17, 1998.

The following day, ABI requested that Lamirande attend another meeting to discuss his alleged misconduct. (A-50). Lamirande asked the Union's acting Business Agent, Howard Ormsby ("Ormsby"), to accompany him to the meeting, and the Company did not object to Ormsby's presence. (A-50-51). ABI requested that Vogel attend the meeting, as well. (A-49-50).

This time it was Ormsby who asked ABI for Finn to attend the meeting. (A-51). ABI declined to add Finn, because Lamirande was more than adequately represented by Ormsby and Vogel and, as between Vogel and Finn, Vogel

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[1] While acknowledging a dispute of fact between the testimony of Lamirande and that of Burlingame, the ALJ assumed that Lamirande asked for Finn at the outset rather than after Vogel appeared. (A-52).

was "up to speed" on the situation. (A-51 & n.10). The ALJ found these reasons to be truthful and found no evidence of an ulterior motive in ABI's not calling Finn to the meeting. (A-53).

The meeting proceeded. Both Vogel and Ormsby participated in the meeting, asking questions and representing Lamirande. *Id.* As to this meeting too, the ALJ concluded that there was "no question in my mind that Lamirande received adequate representation" from Vogel and Ormsby. (A-53).

C. The ALJ's Conclusions.

The ALJ viewed both incidents as raising a "straightforward question concerning the limits of an employee's rights under *Weingarten*[:]" whether an employee has the right to request a specific individual for union representation. (A-53). The ALJ determined that an employee did have such a right, absent extenuating circumstances. (A-59). While the ALJ agreed with ABI that several prior Board cases "support its position that *Weingarten* does not give the employee the right to select a specific representative," he believed that other cases demonstrated that the law had changed. *Id.* After concluding that there were no extenuating circumstances on either date, the ALJ found that ABI had violated Section 8(a)(1) of the Act by failing to provide Finn as representative on both December 16 and 17. *Id.* However, the ALJ contemplated that the Board would provide guidance on the issue, noting that the facts presented a straightforward question for appeal to the Board. (A-53).

D. The Board's Decision.

ABI timely filed exceptions to the decision of the ALJ. On December 19, 2001, the Board issued its Decision and Order, neither commenting on the substance of the ALJ's decision nor answering the question he thought open. (A-

38).

ABI timely filed a motion for reconsideration, asking the Board to explain its decision. On July 5, 2002, the Board issued its Order Granting in Part and Denying in Part Respondent's Motion for Reconsideration, in which it refused to revisit the merits of the underlying decision. (A-89).

On July 9, 2002, ABI filed a petition for review, and thereafter the Board filed an application for enforcement of the Decision.

E. The Decision of the Court of Appeals.

On August 1, 2003, a majority of the panel of the Court of Appeals for the Fourth Circuit denied ABI's petition for review and granted the Board's cross-application for enforcement of its order. In doing so, the Court of Appeals did not identify any right granted by Section 7 of the Act, 29 U.S.C. § 157. Instead, relying upon language in Section 1 of the Act, 29 U.S.C. § 151, the Court of Appeals found that an employee's choice of representative "furthers the ability of workers to seek [mutual] aid and protection." (A-12-13). The majority reasoned that an employee "may generally feel more comfortable with a particular shop steward." (A-13 n.10). Further, relying on this Court's statement in *Weingarten* that the purpose of the right to a representative is to protect a lone employee, the majority concluded that "[i]t is thus reasonable that, absent extenuating circumstances, an employee should be entitled to designate the union representative who will assist him during his employer's investigatory interview." (A-13). Finally, while the majority agreed that certain of the Board's "earlier decisions arguably support the contention that an employee is not entitled to the union representative of his choice," it nonetheless found that the Board had taken a contrary position by 1992. (A-16-19).

REASONS FOR GRANTING THE WRIT

I. Contrary To This Court's Articulation Of The *Weingarten* Right, The Board's New Rule Interferes With "Legitimate Employer Prerogatives."

In recognizing a general right to a union representative in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court intended for that right to be easy to apply and "not interfere with legitimate employer prerogatives." *Id.* at 258. Contrary to that mandate, the Board has adopted a rule that impedes an employer's ability to investigate employee misconduct. According to the Board, an employee has the right to a union representative of his or her choosing, absent extenuating circumstances. The Board thus requires the employer, generally through a front-line supervisor, to make a determination without any meaningful standard as to whether there are "extenuating circumstances" making the requested representative inappropriate. Any time a supervisor says "no" to a request, the employer acts at its peril, even if it provides a *Weingarten* representative.

This case demonstrates the costs of such an error. On December 16, 1998, Burlingame "reasonably believed" that Finn was at lunch and not available to serve as a *Weingarten* representative. Although ABI had no ulterior motive in providing Vogel in lieu of Finn, in the ALJ's opinion, there was nothing about the circumstances that required "instant attention" and were not "extenuating circumstances." (A-59). Thus, the Board would transform every legitimate business decision to refuse a specific representative into an opportunity to litigate whether, in the Board's opinion, the business rationale was extenuating enough to deny the particular request. No purpose of the Act is furthered by that outcome and, instead, the Board's new rule impedes the regular day-to-day interaction between employers and their employees.

II. The Board's New Rule Is Inconsistent With Section 7 of the Act and *Weingarten* Itself.

The Board's willingness to transform an employee's personal preference for a particular union steward into a statutory right under federal labor law is inconsistent with the Court's articulation of the *Weingarten* right and identification of its statutory moorings. In *Weingarten*, the Court recognized an employee's "statutory right" to union representation during an interview which he or she reasonably believes may result in discipline. 420 U.S. at 267. This Court explained that the right was grounded in the fear that a "lone employee" "confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-63. The Court reasoned that the presence of "[*a*] knowledgeable union representative" would protect the employee from being overpowered by the employer and assist the investigation. *Id.* at 263 (emphasis added). Finally, the Court made clear that its articulation represented the "contours and limits" of the right to a union representative.[2] *Id.* at 256.

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[2] In contrast to the decision of the Court of Appeals below, several other courts of appeals have held that the Board does not have a free hand to expand upon the *Weingarten* right. *See Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 473-74 (5th Cir. 1982) (finding that the Board made an unwarranted extension of the employee's *Weingarten* rights when it found a violation although the alleged unlawful conduct was "within the perimeters set forth by the Supreme Court in *Weingarten*"); *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953, 957 (6th Cir. 1980) (rejecting the Board's attempt to expand the "contours" established by the Supreme Court in *Weingarten*); *Climax Molybdenum Co. v. NLRB*, 584 F.2d

A. Having A Representative Cannot Be Equated With Being Denied Representation.

The Board was not free to expand upon the Court's articulation of the *Weingarten* right. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) ("'Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.'") (citation omitted); *see also NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 721 (2001) (rejecting Board's interpretation where it contravened prior decision). By definition, having *a* "knowledgeable" union representative, even if not preferred, is not the equivalent of being subjected to an interview without any representative. At no point was Lamirande *Weingarten's* "lone employee." There is no dispute that on December 16 and 17, 1998, Lamirande was fully and adequately represented by "a knowledgeable union representative" who had been duly elected by the bargaining unit.[3] On these facts, this Court's determination of what is

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360, 363 (10th Cir. 1978) (denying enforcement of Board decision where the Board sought to enlarge the right to a representative to include the right to an adequate opportunity to consult with the representative prior to the interview even though the employee already had ample time for consultation). *But cf. Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (finding that Board's extension of *Weingarten* to non-union setting was a reasonable reading of Section 7 and explaining that case involved a question never reached by the Court in *Weingarten* itself), *cert. denied,* 536 U.S. 904 (2002).

[3] Indeed, on December 17, 1998, it was not Lamirande who requested that Finn appear but the Union's acting Business

the right to a representative of the collective unit was satisfied. The Board nonetheless found ABI in violation because it failed to provide the representative named by the individual employee. Nothing within the "contours and limits" of *Weingarten* supports that finding.

B. The Board's New Rule Is Not Grounded In Section 7 of the Act.

Nor can the Board's finding of a violation of the Act be reconciled with the statutory basis of the *Weingarten* right. In *Weingarten*, the Court found that the concerted nature of the right to a representative, as required under Section 7 of the Act, stemmed from the role of the union representative and not from the desires of the employee seeking assistance. *See id.* at 260; *see also* 29 U.S.C. § 157. The Court explained:

> The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore . . . present . . .

Agent, Ormsby, whom the majority of the Court of Appeal's referred to as "Lamirande's *representative[]*." (A-20 n.19) (emphasis added).

Id. at 260-61 (footnote omitted).[4]

No such collective interest is implicated by an employee's personal preference for one duly elected shop steward over another. By requesting Finn in particular, Lamirande was not acting on behalf of anyone but himself. Lamirande preferred Finn because "he *personally* believed Finn to be a better steward." (A-46, A-48) (emphasis added). As the bargaining unit had elected two equally competent stewards, in no way did Lamirande's preference for one representative over the other affect the interests of other employees in the bargaining unit.

Significantly, the Board did not explain the statutory basis for its new rule.[5] While claiming to defer to the Board's interpretation, the majority of the Court of Appeals for the Fourth Circuit nonetheless attempted to provide a rationale for the result reached by the Board. Apparently

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[4] *See also ITT Lighting Fixtures v. NLRB*, 719 F.2d 851, 854 (6th Cir. 1983) (explaining that Section 7 is triggered under *Weingarten* because the union representative is there to safeguard the rights of the entire bargaining unit).

[5] Indeed, in a recent case, the Board appears to be confused about what it decided here. In *Barnard College*, 340 NLRB No. 106, p. 2 (Oct. 21, 2003), the Board cited to its decision in this case as standing for the proposition that "[t]he selection of an employee's representative belongs to the employee *and the union*, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the meeting." (emphasis added). Nothing in this case involved the Union's selection of Finn over Vogel, and the Board did not treat the existence of extenuating circumstances as being separate from the issue of availability.

recognizing that Section 7's requirement of protected, concerted activity was not satisfied, the majority abandoned *Weingarten*'s statutory basis and attempted to ground the Board's decision upon Section 1 of the Act (29 U.S.C. § 151), Congress's statement of policy. Section 1 supports no individual preferences. To the contrary, this Court has interpreted that language as subordinating those preferences to the collective interests of the bargaining unit. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975). Moreover, Section 8(a)(1) of the Act, which the Board found ABI to have violated, prohibits interference with rights guaranteed by Section 7 (precisely why the Court was concerned in *Weingarten* with the question of whether an employee's right to *a* union representative could constitute concerted activity under that provision). As neither the Board nor the majority of the Court of Appeals has ever explained how an employee's preference for a particular representative is "concerted" within the meaning of Section 7, the Board's finding that ABI violated Section 8(a)(1) should have been vacated, not enforced.

III. The Finding Of a Violation Is Inconsistent With Prior Board Law.

The Board never explained its rationale for finding a violation. Indeed, that finding is inconsistent with its prior decisional law. As both the ALJ and the Fourth Circuit acknowledged, several prior Board decisions expressly rejected the rule adopted here and interpreted *Weingarten* as requiring only that the employer provide upon request *a* union representative. In *Pacific Gas & Electric Co.*, 253 NLRB 1143, 1143 (1981), the employee requested a particular union representative and the company refused to grant that request. In finding no violation, the Board stated, "*Weingarten* neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a

specific representative sought by the employee." *Id.* The Board rejected the rule it has since adopted here, as being "inconsistent with both the legal and policy principles contained in *Weingarten*." *Id.* The Board concluded that so long as "a duly designated union representative was ready, willing, able, and present," it should "inquire no further." *Id.* at 1144. *See also Coca-Cola Bottling Co.*, 227 NLRB 1276, 1276 n.6 (1977) (explaining that the presence of a union representative other than the one requested by the employee is not the same as compelling the employee to attend the meeting with no representation); *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992) (General Counsel conceded that the employer satisfied its obligation under *Weingarten* by providing a union representative, although not the specific steward requested by the employee).

While the ALJ and the majority of the Court of Appeals relied upon three other Board cases to find a violation here -- *Consolidation Coal Co.*, 307 NLRB 976 (1992), *GHR Energy Corp.*, 294 NLRB 1011 (1989), and *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992) -- in none of those cases did the Board undercut its decision in *Pacific Gas & Electric.* The ALJ here distinguished *Consolidation Coal* on its facts. According to the ALJ, in that case, the employer refused the employee's request for an experienced representative and intentionally "forced the employee to instead choose representation from a group of committeemen, *none of whom had ever represented an employee in an investigatory interview*." (A-56) (emphasis added). Likewise, *GHR Energy Corp.*, 294 NLRB 1011, 1042 (1989) arose in the context of a pattern of serious unfair labor practices by the employer, and the employer's refusal to allow a representative of the International to enter the interview room seemed designed to interfere with the union's relationship with employees. Even the ALJ below acknowledged that any reliance on *GHR Energy* was questionable, explaining that "the *Weingarten* issue in *GHR*

Energy Corp., was only a relatively minor part of a major case involving significant unfair labor practices." (A-56, A-90).

Finally, *New Jersey Bell Tel. Co.*, 308 NLRB 277, 282 (1992) involved the right of a *union* to choose its own representative, not an employee's choice. In that case, the employee who was interviewed did not request a specific representative, but requested union representation generally. 308 NLRB at 295. Instead, the issue in that case involved the fact that two representatives appeared at the site of the interview, and the question was whether the employer or the union had the right to decide who would serve as representative, particularly when the union was paying for the representative's time. *Id.*

While the Board here relied upon dicta in that case that "'when two union officials are equally available . . . the decision as to who will serve is properly decided by the union officials,'" (A-58), there is nothing in the case to suggest that the Board was, by that language, overruling a different principle in *Pacific Gas & Electric*. Indeed, the ALJ in that case distinguished *Pacific Gas & Electric Co.*, as involving a different issue than the one before him: whether an employee was entitled to the presence of a specific representative.[6] *Id.* at 307. Not only did *New Jersey Bell Telephone* never reach the question presented here, it was not

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[6] The ALJ in *New Jersey Bell Telephone* also distinguished *Coca-Cola Bottling* on the grounds that that case did not involve two stewards who were equally available. 308 NLRB at 307. Here, there is no dispute that Finn was at lunch on December 16, 1998. (A-52). The Board's claim that an employee who is at lunch and an employee who is on the job are "equally available" from the perspective of a front-line supervisor suggests a disconnect between its decision and the realities of the workplace.

the Board's last word. Two years later, the Board decided *Williams Pipeline Co.*, 315 NLRB 1 (1994), in which it expressly reaffirmed that the *Weingarten* right does not require representation by "a *particular* union representative." *Id.* at 5 (citing *Coca-Cola Bottling Co.*). To the extent one might have thought that the Board had shifted from its decision in *Pacific Gas & Electric*, its latest decision prior to this one, *Williams Pipeline*, demonstrated otherwise.

This Court recognized in *Weingarten* itself that the Board may use an "evolutional approach" in its decisional law, but it must do so by reaching a "fair and reasoned balance" of the competing issues and "adequately explicat[ing] the basis of its interpretation." The Board has not met that standard here. ABI reasonably relied upon the prior decisional law as rejecting the conclusion reached by the Board in this case. The Board has never explained its departure from that law in any case, let alone this one. The finding of a violation nonetheless is an abuse of the Board's discretion to reasonably interpret the Act.

CONCLUSION

For the reasons set forth above, ABI respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,
ANHEUSER-BUSCH, INC.

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Dated: December 24, 2003

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AUGUST 1, 2003

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

v. No. 02-1740

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v. No. 02-1897

ANHEUSER-BUSCH, INCORPORATED,
Respondent.

On Petition for Review and Cross-application for Enforcement of an Order of the National Labor Relations Board.
(3-CA-21796, 3-CA-21906, 3-CA-22112)

Argued: February 26, 2003

Decided: August 1, 2003

Before WIDENER, KING, and SHEDD, Circuit Judges.

Petition for review denied and cross-application for enforcement granted by published opinion. Judge King wrote the opinion, in which Judge Widener joined. Judge Shedd wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Arthur G. Telegen, FOLEY HOAG, L.L.P., Boston, Massachusetts, for Anheuser-Busch. Christopher Warren Young, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board. ON BRIEF: Robert A. Fisher, FOLEY HOAG, L.L.P., Boston, Massachusetts, for Anheuser-Busch. Arthur F. Rosenfeld, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Frederick C. Havard, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board.

OPINION

KING, Circuit Judge:

Anheuser-Busch Incorporated ("Busch") petitions this Court for review of a Decision and Order entered against it by the National Labor Relations Board (the "Board"). *Anheuser-Busch, Inc.*, 337 N.L.R.B. No. 2 (Dec. 19, 2001) (the "Order").[1] By its Order, the Board affirmed an earlier decision of an Administrative Law Judge (the "ALJ"), who concluded that Busch, on four occasions, had violated § 8(a)(1) of the National Labor Relations Act (the

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[1]The Board subsequently made technical corrections and modified, in minor part, its rulings against Busch. *Anheuser-Busch, Inc.*, 337 N.L.R.B. No. 121 (July 5, 2002). In referring to the Order, we are referring to it as modified.

"Act").[2] The Board has cross-applied for enforcement of its Order. As explained below, we deny the petition for review and grant the Board's cross-application for enforcement.

I.

Busch operates twelve breweries in the United States, including a brewery in Baldwinsville, New York (the "Baldwinsville brewery"). At the Baldwinsville brewery, certain of Busch's employees are represented by the Brewery Conference of the International Brotherhood of Teamsters and the International Brotherhood of Teamsters, Local No. 1149 (collectively, the "Teamsters"). In 1998 and 1999, the Teamsters and brewery management engaged in contract negotiations on a new collective bargaining agreement, leading to several controversial incidents at the Baldwinsville brewery. As a result of these incidents, the Teamsters filed a series of charges with the Board, asserting that Busch had committed a host of unfair labor practices. Ultimately, on December 2, 1999, the charges were consolidated into a complaint against Busch (the "Complaint"), issued by the Board's Regional Director for the New York area.[3]

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[2]The Act is codified at 29 U.S.C. §§ 151-169, and § 8(a)(1) is codified at 29 U.S.C. § 158(a)(1).

[3]The Teamsters initiated these proceedings by filing charges with the appropriate Regional Director, who decided to issue and prosecute the Complaint. *See* 29 C.F.R. § 101.8 (stating that if charges appear to have merit, Regional Director institutes formal action by issuing complaint and notice of hearing). The Teamsters then participated in the proceedings before the ALJ. *Id.* § 101.10; 102.38. It is appropriate for Busch to have petitioned for review in this Court because the company transacts business in Virginia. *See* 29 U.S.C. § 160(f) (stating that petition may be filed in any circuit where party "transacts business").

In order to assess the Teamsters's allegations, the ALJ conducted a hearing in Syracuse, New York, from March 8 through 10, 2000. On July 7, 2000, the ALJ issued his decision, making findings of fact and conclusions of law, and preparing a recommended order (the "ALJ Decision").[4] The ALJ concluded that Busch had committed four unfair labor practices involving three employees who worked at the Baldwinsville brewery, specifically, Patrick Lamirande, Joseph Rimualdo, and Brian Meany. After the ALJ Decision was filed with the Board, Busch filed exceptions to it. On review, the Board affirmed the ALJ's findings of fact and conclusions of law, and it adopted his recommended order.[5] Order at 1. As noted above, Busch has petitioned for our review of the Order, and the Board has cross-applied for its enforcement. We possess jurisdiction pursuant to 29 U.S.C. § 160(f).

II.

A. Incidents Involving Patrick Lamirande

On December 15, 1998, Teamsters member Patrick Lamirande, a production operator at the Baldwinsville brewery, allegedly obstructed an independent contractor doing work for Busch (the "Contractor Incident"). At approximately 11:15 the following morning, Mark

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[4]The ALJ Decision is published with the Board's Order at 337 N.L.R.B. No. 2 (Dec. 19, 2001).

[5]In resolving a complaint, an ALJ is obliged to set forth his findings of fact and conclusions of law, in addition to preparing a recommended order. 29 C.F.R. § 101.11. An ALJ's decision, including his recommended order, is then filed with the Board. *Id.* If a party files exceptions, the Board reviews the exceptions and issues a decision and order. *Id.* § 101.12(a). If no exceptions are filed, the ALJ's decision and recommended order become the decision and order of the Board. *Id.* § 101.12(b).

Burlingame and Art Lux, members of the brewery's management, approached Lamirande and began questioning him about the incident. Lamirande promptly requested the presence and assistance of Dan Finn, a shop steward in Lamirande's department, who was already aware of the facts underlying the Contractor Incident.[6] Assuming Finn was at lunch, Burlingame declined this request, calling instead for Fred Vogel, another shop steward in Lamirande's department. Vogel arrived at the site of Lamirande's questioning within fifteen minutes, and after speaking privately with Lamirande, Vogel renewed the request for Finn's presence. Burlingame denied this request, stating that Lamirande should respond to the allegations immediately. Lamirande declined to discuss the matter without Finn, and Burlingame sent him home for the day.

The next morning, December 17, 1998, Lamirande was directed to Burlingame's office for a meeting with management. Upon reporting to the office, he met with Vogel, Burlingame, Lux, Howard Ormsby (a Teamsters business agent), and Ken Silva (a brewery assistant manager). Ormsby, speaking on Lamirande's behalf, requested that Finn be allowed to attend the meeting and represent Lamirande, but Silva insisted that Finn's presence was unnecessary. Lamirande was questioned without Finn, and Burlingame thereafter informed Lamirande that he would be disciplined for the Contractor Incident. As a result of these events, the Teamsters filed a charge with the Board, alleging that Busch had committed two unfair labor practices in refusing Lamirande's requests (on December 16 and 17) to be represented by Finn.

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[6]A shop steward is a union member who, among other duties, is authorized to act as an employee's representative in an investigatory interview. *See generally* 29 U.S.C. § 402(q).

In assessing the Teamsters's allegations, the ALJ ruled that, under the Supreme Court's seminal decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), and pursuant to the Board's related precedents, "an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." ALJ Decision at 6. Pursuant to this principle, the ALJ concluded that, although Finn may have been eating lunch when Burlingame initially wanted to question Lamirande, Finn was nevertheless "available" as a representative. *Id.* Finn had previously circumscribed his lunch breaks in order to represent employees. In any event, Finn would have completed his lunch break within fifteen minutes of Lamirande's initial request. By its Order, the Board agreed with the ALJ's ruling that Busch had committed two unfair labor practices in denying Lamirande's requests to be represented by a particular shop steward. Order at 1.

B. Incidents Involving Joseph Rimualdo

In 1987, Joseph Rimualdo, a member of the Teamsters, began working in the packaging, bottling, and shipping department of the Baldwinsville brewery. In 1998, he became a shop steward, and he soon learned of certain safety issues in two other departments of the brewery. In January of 1999, he filed six grievances related to those safety issues. Upon being informed of these grievances, Fred Singler, the manager of Rimualdo's department, met with Rimualdo and the managers of the two departments involved in the safety grievances, Lux and Nick Alivero. In this meeting, Singler asserted that Rimualdo had failed to follow the proper procedures for addressing the safety issues. Rimualdo admitted that this assertion was accurate, and the meeting adjourned. Four

days later, upon seeing Rimualdo drinking a Labatt's Blue beer in a tavern near the brewery, Lux said, "This is two strikes. You got one for filing safety grievances and you got one for drinking Labatt's Blue." ALJ Decision at 11. As a result of this incident, the Teamsters charged Busch with an unfair labor practice, asserting that Lux had threatened Rimualdo for filing safety grievances, an activity protected by the Act.

Before a hearing was conducted on this charge, Rimualdo was involved in another incident at the brewery. On August 25, 1999, Rimualdo, with a group of fellow employees, was hand stamping dates on packages of beer. On that occasion, Rimualdo accidentally got ink on his hands. Lux approached the group and, according to Rimualdo, said, "You got to be careful what you say and what you do around this guy, he's bad news." Lux then stated to Rimualdo: "You got to be pretty good with having ink on your fingers." *Id.* at 12. The latter comment, according to Rimualdo, referred to Rimualdo's recent arrest and fingerprinting in a domestic incident involving his ex-wife. Lux told him, "You made it very tough for me, filing those charges with the [Board]. We'll see in September." *Id.* Rimualdo claimed that, after these statements, Lux threatened to get even with him in some way.[7] Based on this incident (the

[7]Other employees, including Dwight Hart and Supervisor Dan Tamulevich, were present during Lux's interactions with Rimualdo. Hart corroborated Rimualdo's version of events, indicating that Lux made remarks about the ink on Rimualdo's hands and that Lux commented on the pending charges before the Board. By contrast, Lux and Supervisor Tamulevich insisted that it was Rimualdo, in making a joke at his own expense, who referred to the ink on his hands. Tamulevich denied that Lux had referred to the grievances Rimualdo had filed or to the upcoming hearing on the two strikes incident.

"Stamping Incident"), the Teamsters, on September 8, 1999, charged Busch with another unfair labor practice charge, alleging that Busch had "interfered with, restrained and coerced Rimualdo in the right to engage in protected, concerted activity by threatening and disciplining him for filing a charge with the [Board]."[8]

As to Lux's comments at the tavern, the ALJ found that they were based on Rimualdo's apparent disloyalty in drinking a competitor's beer, rejecting the Teamsters' assertion that Busch had threatened Rimualdo because he had filed safety grievances. ALJ Decision at 11. The ALJ thus concluded that Lux's comments to Rimualdo at the tavern did not constitute an unfair labor practice. *Id.* On the Stamping Incident, however, the ALJ found that Lux had threatened Rimualdo because of the Teamsters' pending charge before the Board, and he thus concluded that Busch had committed an unfair labor practice. *Id.* at 12. By its Order, the Board agreed with the ALJ's determinations. Order at 1.

C. Incidents Involving Brian Meany

On February 11, 1999, Teamsters member Brian Meany, an employee in the brewing department of the Baldwinsville brewery, attended a mandatory company communications meeting conducted by Michael Harding, a senior executive from Busch's headquarters in St. Louis. At the outset of Harding's presentation, the brewery's employees were advised that the meeting was for the purpose of discussing Busch's financial performance and that there would be no discussion of collective bargaining or "contract issues." Following his presentation,

[8]The Complaint issued by the Board's Regional Counsel revised this allegation slightly, asserting that Busch had threatened Rimualdo because "he had *given testimony* to the Board" during a prior investigation.

Harding entertained questions from employees. At that time, Meany criticized Busch for its treatment of workers at the Baldwinsville brewery. At one point, Meany read a list of symptoms of an abused spouse, drawing an analogy to Busch's treatment of its employees. During Meany's commentary, Harding urged Meany to keep his comments brief, but Meany ignored this request.

When Meany reported to work the next day, February 12, 1999, he was advised to find a shop steward and report to Brewmaster Sammartino's office for a meeting with Sammartino and Human Resources Manager Larry Harmon. At the meeting, Sammartino criticized Meany for disrupting the communications meeting, suggesting that, if Meany behaved that way again, he would be removed from the Baldwinsville brewery and disciplined. Sammartino then said, "I want you to know that the work you do on the floor here does not outweigh the things you do in communications meetings. If you speak again at a communications meeting, you will be fired." ALJ Decision at 8. After Meany requested that this restriction be placed in writing, Harmon said, "You know what, you will be fired. Then the [Teamsters] will go through the grievance procedure and what will happen will happen." *Id.*

As a result of this incident, the Teamsters charged that Busch had interfered with Meany's right to engage in a protected activity by threatening him for voicing his opinions on collective bargaining issues. As to this charge, the ALJ agreed with the Complaint, concluding that Busch management threatened Meany in reaction to a protected activity and that Busch had thus engaged in an unfair labor practice. *Id.* at 8-9. The Board also affirmed this conclusion, agreeing that Busch had committed an unfair labor practice in its treatment of Meany. Order at 1.

III.

In considering a petition for review, we are obliged to uphold the Board's legal interpretations if they are "rational and consistent" with the Act. *Sam's Club, a Div. of Wal-Mart Stores, Inc. v. NLRB*, 173 F.3d 233, 239 (4th Cir. 1999) (internal quotation marks omitted). Indeed, if the Board's resolution is a "defensible construction of the statute," it is entitled to deference, because the "function of [effectuating] national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." *Arrow Auto. Indus., Inc. v. NLRB*, 853 F.2d 223, 237 (4th Cir. 1988) (internal quotation marks omitted). In deciding legal issues, however, the Board should apply its principles consistently. *Sara Lee Bakery Group, Inc. v. NLRB*, 296 F.3d 292, 295 (4th Cir. 2002). And when the Supreme Court has already interpreted a statutory provision, the Board's interpretation and application of the statute will be judged in relation to the Court's rulings. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992). Findings of fact made by an ALJ and affirmed by the Board are conclusive, so long as they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). And we have characterized substantial evidence as being "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1269 (4th Cir. 1994) (internal quotation marks omitted).

IV.

We now turn to Busch's contentions that the Board erred in deciding that Busch had committed unfair labor practices in its treatment of Lamirande, Rimualdo, and

Meany.[9] First, we assess Busch's position regarding Lamirande's right to a particular union representative. Second, we consider Busch's contentions with regard to the charge involving Rimualdo. Finally, we examine its challenges regarding Meany's activities at the communications meeting.

A.

Busch first challenges the rule articulated by the Board that, absent extenuating circumstances, an employee subjected to an employer's investigation has the right to specify the union representative of his choice (the "Representation Rule").[10] Busch challenges the Representation Rule on three primary bases. First, it contends that the Rule is inconsistent with the Act. Second, it maintains that, even if it is consistent with the Act, the Rule is contrary to the Board's own precedents. Finally, and relatedly, Busch insists that the Rule cannot be applied to this case because of the principle barring retroactive application of the Board's rules.

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[9]Each of the four unfair labor practices found by the ALJ and the Board involve § 8(a)(1) of the Act, which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." Pursuant to § 7 of the Act, employees have the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection."

[10]Our dissenting colleague suggests that our shorthand use of the phrase "Representation Rule" refers to a rule we invented in this proceeding. *See ante* at 30. To the contrary, this is the Board's rule. In focusing on our rhetoric, our colleague has obscured the real issue in this case: whether the Board's Representation Rule is "rational and consistent" with the Act. Put differently, we are not assessing whether the Act entitles an employee to choose among available union representatives, but rather whether the Board's interpretation is a "defensible construction of the statute." *Arrow Auto. Indus., Inc.*, 853 F.2d at 237.

1.

To begin with, Busch insists that the Representation Rule is inconsistent with the fundamental purposes of the Act, as interpreted by the Supreme Court in *Weingarten*. According to Busch, the Representation Rule interferes with an employer's legitimate interests in disciplining its workers. Finally, it contends that the statutory basis of *Weingarten* (i.e., that union representation safeguards the collective interests of the bargaining unit) is inapplicable here.

In *Weingarten*, the Supreme Court held that an employee has a right to union representation at any investigatory interview threatening disciplinary action. 420 U.S. at 253. An employer thus commits an unfair labor practice in denying an employee's request for such representation. *Id.* Here, the Board decided that, in light of the Supreme Court's decision in *Weingarten* and the Board's experiences in resolving *Weingarten*-type disputes, an employee is entitled, absent extenuating circumstances, to the union representative of his choice. As explained below, we see the Representation Rule as a reasonable interpretation and application of the Act.

First, the Act—as interpreted by the Supreme Court in *Weingarten*—generally contemplates that an employee will have his choice as to union representation. Indeed, § 1 of the Act provides that the Act's purpose is to protect "the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing*." 29 U.S.C. § 151 (emphasis added). In *Weingarten*, the Court emphasized that the right to union representation "plainly effectuates the most fundamental purposes of the Act," which is to enable workers to seek

mutual aid and protection without undue interference by their employers. 420 U.S. at 262. The choice of a representative plainly furthers the ability of workers to seek such aid and protection.[11]

Second, the Act attempts to rectify the inherent power imbalance of the workplace, and an employee's ability to choose his own union representative serves this goal. When an employee requests union representation in an investigatory interview, the employee is seeking assistance to deal with a "confrontation with his employer." *Id.* at 260. In such a confrontation, the employee is generally at some disadvantage, and the recognition of his right to choose his representative serves, to some extent, to mitigate this inequality. As the Court stated in *Weingarten*, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate." *Weingarten*, 420 U.S. at 262 (internal quotation marks omitted). It is thus reasonable that, absent extenuating circumstances, an employee should be entitled to designate the union representative who will assist him during his employer's investigatory interview.[12]

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[11]Absent extenuating circumstances, an employer has no interest in selecting between available representatives. By contrast, employees do have an interest in selecting between representatives. For example, an employee may know that a representative is already familiar with the investigation, or may generally feel more comfortable with a particular shop steward. In fact, in this instance, one of the reasons Lamirande requested Finn was that Finn was aware of the facts involved in the Contractor Incident. ALJ Decision at 3 (stating that when Vogel first spoke with Lamirande, Lamirande stated: "I would like to see Dan Finn because he is aware of my situation").

[12]In reaching this conclusion, we are not placing an undue burden on employers. An employer need not always summon a requested representative. The employer may deny an

In this situation, the union had designated two shop stewards in Lamirande's department to serve as employee representatives. When Lamirande initially requested representation by Finn,[13] "no representative was present" at the site of the proposed interview. ALJ Decision at 6. Indeed, Vogel was then in another part of the brewery and had to be summoned via radio. *Id.* at 3. Finn was at lunch, but on previous occasions he had circumscribed his lunch breaks in order to represent employees. Additionally, he would have completed his lunch break within fifteen minutes of the outset of the interview. *Id.* at 6. The ALJ concluded that the fact Finn was on his lunch break at the time of the initial request did not render him "less 'available' than Vogel" to represent Lamirande.[14] *Id.* In these circumstances, and in keeping with applicable legal principles, the ALJ did not err in

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employee's request for a particular representative, forego the interview process, and render a decision based on the information it has already obtained. *Weingarten*, 420 U.S. at 258. Or, if extenuating circumstances exist (i.e., if the requested representative is unavailable), the employer may reject the employee's request and proceed accordingly.

[13]Busch asserts that the record fails to support the conclusion that Lamirande requested representation by Finn before Burlingame called for Vogel. Indeed, Busch maintains that the ALJ simply assumed this fact in order to create the current controversy. The ALJ, however, faced with conflicting evidence on this point, was entitled to find, as he did, that Lamirande had requested Finn's presence before Burlingame called for Vogel. ALJ Decision at 4.

[14]The ALJ acknowledged that a "short delay" would have resulted *if* Busch, before seeking Finn's presence at the interview, had waited until he completed lunch. ALJ Decision at 6 (emphasis added). However, because Finn had previously circumscribed his lunch breaks to represent employees; because Finn would have finished his break in fifteen minutes; and because the allegations against Lamirande did not demand "instant attention," the ALJ concluded that Busch did not have

deciding that Busch should have given Lamirande access to the representative of his choice.[15]

"sufficient reason to deny Lamirande the representation he wanted." *Id.* Thus, the ALJ found that "the fact that Finn was [at lunch] for a short period of time [did not make] him any less 'available' than Vogel." *Id.* Busch does not maintain that substantial evidence fails to support this finding, and we have no basis for rejecting it. It is difficult to understand our colleague's assertion that "[t]he ALJ clearly erred in deciding that Steward Finn was not less 'available' than Steward Vogel." *Ante* at 27. Our review of findings of fact is limited to whether such findings are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). And, as is often noted, although substantial evidence requires more than a mere scintilla, it is less than a preponderance. *Weis Markets, Inc. v. NLRB*, 265 F.3d 239, 243 (4th Cir. 2001). The ALJ was in a better position to assess the representatives' respective availability, and there is sufficient support in the record to justify the ALJ's finding in this regard.

[15]The Representation Rule may well be consistent with the prevailing industrial practice. *Cf. Weingarten*, 420 U.S. at 267 (reasoning Board's construction was in "full harmony with actual industrial practice"). At a minimum, the Rule is consistent with an agreement between Busch and the Teamsters for future *Weingarten* situations. ALJ Decision at 3; *see also Coca-Cola Bottling Co. of Los Angeles*, 227 N.L.R.B. 1276 (1977) (stating that, if requested representative had not been on vacation, employer would have adhered to its past practice and granted employee's request for particular representative). The separate opinion suggests that the Board's Representation Rule will discourage employers from conducting investigatory interviews. *Ante* at 28. Congress, however, has decided that such policy concerns are best addressed by the Board. Indeed, our standard of review, i.e., whether the Board's rule is "rational and consistent" with the Act, ensures that the Board, rather than the courts, has the authority to resolve such concerns. *See Arrow Auto. Indus., Inc.*, 853 F.2d at 237.

2.

Busch next contends that the Representation Rule is inconsistent with Board precedent. *See Sara Lee Bakery Group, Inc. v. NLRB*, 296 F.3d 292, 295 (4th Cir. 2002) (holding that Board must apply its principles consistently). In assessing this challenge to the Board's ruling, we note that the Court in *Weingarten* rejected a similar contention regarding the Board's consistency in adhering to precedent. There, the employer pointed to several Board decisions, which had held that a union representative was not required to be present at an investigatory interview. The Court decided that, because an administrative rule normally "involves an evolutionary process," the Board was entitled to modify its rule over time. *Weingarten*, 420 U.S. at 265. The Court observed that it would "misconceive the nature of administrative decisionmaking" to hold "that the Board's earlier decisions froze the development of this important aspect of the national labor law." *Id.* at 265-66.

We agree with Busch that certain of the Board's earlier decisions arguably support the contention that an employee is not entitled to the union representative of his choice. Specifically, in *Coca-Cola Bottling Co. of Los Angeles*, 227 N.L.R.B. 1276 (1977), the Board decided that an employer had not committed an unfair labor practice by refusing an employee's request to be represented by a particular shop steward. In that case, the employee requested representation by a vacationing union representative. The Board decided that, because of the unavailability of the requested representative, the employer had not committed an unfair labor practice in declining to wait for the requested representative to return from vacation. In so concluding, the Board

stressed the admonition in *Weingarten* that the right to choose representation should not interfere with an employer's legitimate business interests, such as conducting investigatory interviews without undue delay.

Similarly, in *Pacific Gas & Electric Co.*, 253 N.L.R.B. 1143 (1981), the Board concluded that an employee did not have the right to choose a particular union representative. In that situation, the employer operated two facilities, separated by twenty minutes of driving time. During an interview at one facility, an employee requested a union representative from the other facility, even though the requested representative did not usually represent employees at the interview location. The employer refused this request, instead calling for the representative the union had designated for the facility where the interview was to occur. Given those circumstances, the Board concluded that the employer did not violate the Act by refusing the employee's request. *Id.* at 1144.

Although the Board's *Coca-Cola* and *Pacific Gas* decisions indicate that employees are not entitled to choose a representative, the Board, in more recent decisions, has refined its rule regarding union representation. For example, in *GHR Energy Corp.*, 294 N.L.R.B. 1011 (1989), the Board was faced with a situation where the requested union representative was available. In those circumstances, the Board ruled that the employer had violated the Act in denying an employee his chosen representative. *Id.* at 1042 (finding that the employer's "refusal to permit [an employee] to exercise his right to select a union representative in accordance with the *Weingarten* doctrine . . . violated § 8(a)(1) of the Act"). Thus, by 1989, the Board had firmly indicated that, so long as the requested union representative is reasonably available,

an employer should accommodate an employee's request for a particular representative. *See also Consolidation Coal Co., Robinson Run Mine No. 95*, 307 N.L.R.B. 976 (1992) (ruling that employer committed unfair labor practice in denying employee's request when union representative was available and ready to proceed).

Then, in *New Jersey Bell*, 308 N.L.R.B. 277 (1992), the Board again addressed this issue. There, a union attempted to provide an employee with a particular representative, but the employer ignored the union's choice and picked another representative. The employer contended that, pursuant to *Weingarten*, *Pacific Gas*, and *Coca-Cola*, it was not obligated to provide the employee with the representative selected by the union. The ALJ in *New Jersey Bell* rejected this contention, observing that the Board's decisions in *Pacific Gas* and *Coca-Cola* stood only for the proposition that an employer need not postpone its investigatory interview in order to accommodate an employee's request.[16] The ALJ concluded that the employer was obliged to demonstrate a significant reason for denying the union's request for a particular representative. Because the union's chosen representative was, in the words of the ALJ, "just as available" as the representative selected by the employer, the employer had violated the Act. The ALJ believed that, unless special circumstances exist, an employer has no interest in selecting the representative. On review, the Board adopted a forerunner of the Representation Rule, concluding that: "when two union officials are equally available to serve as a *Weingarten* representative . . . the decision as to who will

[16]The ALJ in *New Jersey Bell* also distinguished *Pacific Gas* because the *Pacific Gas* employee had requested a representative who did not normally represent employees at the interview location, and the union already had a system in place whereby an on-site representative was available.

serve is properly decided by the union officials, unless the employer can establish special circumstances."[17] *Id.*

Thus, by 1992, the Board had taken a firm position that, absent special circumstances (i.e., the requested union representative is unavailable), the choice as to who will represent an employee during an investigatory interview resides with the union and the employee, not the employer.[18] Beginning in 1977 with its *Coca-Cola* decision, the Board has simply "modified and reformed its standards on the basis of accumulating experience," as authorized and approved by the Court in *Weingarten*. In such circumstances, we are constrained to conclude that the Representation Rule is consistent with Board precedent.

3.

Busch also asserts that the Representation Rule cannot be applied to this case because it would be a retroactive application of the Rule. *See ARA Serv., Inc. v. NLRB*, 71 F.3d 129, 135 (4th Cir. 1995) (stating that Board cannot retroactively apply new rules). At the time of its *Coca-*

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[17]In *New Jersey Bell*, the Board disagreed with the ALJ's determination that the employer had violated the Act. It concluded that, because the requested representative had exceeded the scope of representation in a prior interview, the employer had established special circumstances for its denial.

[18]In support of its position here, Busch also relies on the Board's decisions in *Williams Pipeline Co.*, 315 N.L.R.B. 1 (1994) and *LIR-USA Manufacturing, Co.*, 306 N.L.R.B. 298 (1992). In *Williams Pipeline Co.*, however, the Board merely recognized that an employer does not have to postpone an investigatory interview when another union representative is available. 315 N.L.R.B. at 5. And in *LIR-USA*, the ALJ simply noted that an employer is not obligated to accommodate an employee's request when a requested representative is unavailable. 306 N.L.R.B. at 302. Neither of these decisions is contrary to the Representation Rule.

Cola and *Pacific Gas* decisions, the Board had not decided that an employee is entitled to the union representative of his choice. Since then, however, the Board has refined its approach to union representation, developing its present position over the course of many years and several decisions. In light of these developments, the Representation Rule does not signify a substitution of new law for old law. *See ARA Serv., Inc.*, 71 F.3d at 135 ("[Only w]hen a Board decision creates a new rule . . . by overruling past precedents relied upon by the parties [is] the propriety of its retroactive application called into question."). In sum, we conclude that the Board appropriately found Busch to have committed unfair labor practices by failing to accommodate Lamirande's requests for a particular representative.[19]

B.

On the Board's disposition of the charges relating to Rimualdo, Busch challenges the Order in two respects. First, it contends that the Board violated its due process rights by finding an unfair labor practice that was not alleged in the Complaint. Second, it maintains that the ALJ's finding regarding Lux's threat to Rimualdo is not supported by substantial evidence. We assess these contentions in turn.

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[19]Busch also asserts that the record does not support the ALJ's finding that Lamirande personally requested Finn's presence on December 17, 1998. That Lamirande's request was voiced by Lamirande's representatives on December 17, 1998, does not alter the fact that Lamirande had personally requested Finn's presence on the prior day. In these circumstances, the ALJ was entitled to find that Lamirande had requested Finn's presence on December 17th, even though his request was technically made through a union official.

1.

In their initial charge, the Teamsters alleged that Busch "interfered with, restrained and coerced Rimualdo in the right to engage in protected, concerted activity by threatening and disciplining him *for filing a charge* with the [Board]." The Complaint, by contrast, alleged that, on August 25, 1999, Busch (through its agent Lux) "threatened an employee with unspecified reprisals because the employee had *given testimony* to the Board during a prior investigation." After the hearing, the ALJ found that Busch had threatened Rimualdo for causing the Teamsters *to file* an unfair labor practice charge in connection with the two strikes incident. The ALJ's conclusion tracks the language of the initial charge that the Teamsters filed with the Board (and served on Busch) rather than the allegation of the Complaint. Busch asserts that, in these circumstances, it was denied due process because the ALJ's finding had no foundation in the Complaint.

In similar circumstances, we rejected an employer's challenge - based on a due process contention - that the Board had found an unfair labor practice not alleged in the complaint. In *Standard-Coosa-Thatcher Carpet Yarn Division v. NLRB*, 691 F.2d 1133, 1136 n.3 (4th Cir. 1982), the Board's General Counsel charged that an employer had threatened its employee with a loss of benefits if she voted in favor of a union. After hearing and considering evidence, the ALJ and the Board concluded that the employer had actually enticed the employee with a promise of benefits if she voted against the union. The employer objected to this finding, asserting that it was at variance with the complaint. We disagreed, concluding that the employer had ample notice that an unfair labor

practice was alleged with respect to the specific conversation between the employer and the employee. Thus, the employer had received due process in the Board proceeding even though the ALJ's finding was phrased differently from the allegation of the complaint. *Id.* (citing *NLRB v. Tamper, Inc.*, 522 F.2d 781, 790 (4th Cir. 1975)).

The principle established in *Standard-Coosa-Thatcher* is controlling here. Busch was on notice that Lux's comments to Rimualdo during the Stamping Incident formed the gravamen of the unfair labor practice charge set forth in the Complaint. Indeed, four separate witnesses testified about the Stamping Incident, and the content and context of Lux's comments to Rimualdo were fully litigated. As in *Standard-Coosa-Thatcher*, the ALJ and the Board were entitled to articulate their findings in a manner that comported with the evidence. *Standard-Coosa-Thatcher*, 691 F.2d at 1133 n.3. In these circumstances, Busch received ample notice that it was being charged with an unfair labor practice because of Lux's statements on August 25, 1999, in connection with the Stamping Incident. Thus, Busch received all the process it was due.

2.

Busch next contends that the record fails to support the ALJ's finding that Lux threatened Rimualdo for engaging in protected activity. Under § 8(a)(1), the filing of "grievances and Board charges are protected activities under the Act." *Equitable Gas Co., Div. of Equitable Res., Inc. v. NLRB*, 966 F.2d 861, 866 (4th Cir. 1992) (citing 29 U.S.C. § 157 and *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836, (1984)). An employer thus "violates § 8(a)(1) by threatening reprisals for engaging in such protected activity." *Id.* (citing *NLRB v. U.S. Postal Serv.*,

906 F.2d 482, 486 (10th Cir. 1990)). Here, the ALJ decided that Lux was threatening Rimualdo because of the pending charges before the Board. In so concluding, the ALJ simply credited Rimualdo's and Hart's versions of the Stamping Incident, rejecting the conflicting evidence offered by Busch. When an administrative record is fraught with conflicting testimony, we are obliged to defer to the Board's resolution of such conflicts. *See NLRB v. Air Prods. & Chems., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983). We are thus constrained to conclude that the ALJ's finding—i.e., that Lux threatened Rimualdo for engaging in protected activity—is supported by substantial evidence.

C.

Finally, Busch raises two challenges to the Board's conclusion that it committed an unfair labor practice with respect to Brian Meany. First, it contests the ALJ's finding that Meany engaged in protected activity during the communications meeting. Second, it maintains that the Order and remedial notice are overly broad. We assess each of these contentions in turn.

1.

On the evidentiary issue, the record amply supports the ALJ's finding that Meany was engaged in protected conduct during the communications meeting. ALJ Decision at 8-9. When an employee makes comments or asks questions of his employer concerning working conditions, he is unquestionably engaging in protected activity. *See Consumer Prod. Co.*, 282 N.L.R.B. 130, 132 (1986). An employee, however, can lose the Act's protections if his "conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the

employee unfit for further service." *Id.* In support of its contention on this issue, Busch relies primarily on the Board's decision in *Eagle Picher Industries, Inc.*, 331 N.L.R.B. 169 (2000). There, the employer instructed his employees to hold questions until the end of a company presentation, but an employee disobeyed the instruction and continuously interrupted the presentation. In its decision, the Board concluded that the employee's conduct was not protected by the Act.

This case presents a factual setting that differs materially from *Eagle Picher*. The communications meetings sponsored by Busch were mandatory for all employees. At the end of each meeting, Busch allowed its employees to ask questions. As the ALJ concluded, an employer should reasonably expect unfavorable questions or statements in such situations. ALJ Decision at 8-9. In the communications meeting, Meany did not interrupt Harding's presentation. Indeed, he waited until Harding recognized him for a question before discussing issues concerning employee morale. The record thus supports the Board's conclusions that Meany's comments were not inappropriate, much less egregious, and that he was engaged in protected activity. Order at 1.

2.

Busch also asserts that the remedy crafted by the Board is overbroad, in that it is not properly tailored to fit the unfair labor practice it was intended to redress. *See Ultrasystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 258 (4th Cir. 1994). By its Order, the Board required the posting of a notice advising Baldwinsville brewery workers that Busch was prohibited from threatening to "discharge an employee if he or she engages in a concerted protected activity, including engaging in such activity

when speaking at corporate communications meetings." Order at 1. It is elementary that the Board possesses broad discretion in crafting its orders, *Ultrasystems*, 18 F.3d at 258, and there is no requirement that such an order be tailored so as to preclude only the unlawful conduct arising from a particular incident or employee. *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 568 (1950). In these circumstances, and in light of these principles, the terms of the Order are not overbroad.

V.

Pursuant to the foregoing, we deny Busch's petition for review and grant the Board's cross-application for enforcement.

PETITION FOR REVIEW DENIED AND CROSS-APPLICATION FOR ENFORCEMENT GRANTED

SHEDD, Circuit Judge, concurring in part and dissenting in part:

I concur in the part of the majority opinion denying Busch's petition for review and granting the Board's cross-application for enforcement as to the Rimauldo and Meany incidents. I dissent, however, from the majority's denial of Busch's petition for review and its grant of the Board's cross-application for enforcement relating to the two Lamirande incidents.

I dissent for several reasons. Most important, the majority's "Representation Rule" exceeds the scope of § 7 of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 157. Also, under the particular facts of this case, Busch afforded Lamirande all the important

protections that § 7 and the *Weingarten* rule were intended to provide. Moreover, the majority's "Representation Rule" actually tends to undermine the protections afforded by the *Weingarten* rule.

I.

The majority's "Representation Rule" impermissibly expands the right first announced by the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).[1] The employer in *Weingarten* accused one of its employees of stealing. The employer's security agent interviewed the employee about the allegations. Although the employee repeatedly requested a union steward to assist her during the interview, the security agent refused. After verifying the employee's defense, the security agent apologized to the employee and assured her that the matter was closed.

Relieved, the employee burst into tears and made a seemingly incriminating statement about a separate matter. The security agent immediately launched yet another investigatory interview. The employee again asked for a union steward, but the agent again denied the request.

The Supreme Court held that a union employee is entitled to have union representation during an investigatory interview that the employee reasonably believes

[1]The majority insists that the "Representation Rule" is the Board's invention rather than its own. *Ante* at 9, n.10. The majority's insistence on this somewhat semantical point is curious. First, the majority, not the Board, coined the phrase "Representation Rule." Second, even though the majority may not have "invented" the "Representation Rule," the majority has placed its imprimatur on the new rule by finding it to be rational and consistent with the Act. Third, future litigants seeking protection or further extension of the "Representation Rule" will surely cite the majority's opinion rather than the Board's order.

might result in disciplinary action. *Id.* at 262. This proposition has generally become known as the "*Weingarten* right" or the "*Weingarten* rule." *See, e.g.*, B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, Wm. & Mary L. Rev. 1123, 1171 (1992). The Court in *Weingarten* based its conclusion on the provisions of § 7 of the Act, the same provision at issue in this case. Section 7 states in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....* (Emphasis added).

The Court reasoned that an employee's right to union representation during an investigatory meeting is based on the guarantee that employees have under § 7 to act in concert "for mutual aid or protection." *Weingarten*, 420 U.S. at 260.

In wrestling with the seeming inconsistency between the statutory language, on one hand, which is aimed at "concerted" activity and "mutual" aid and protection, and the individual employee's claim, on the other hand, that she had been deprived of union representation during an investigatory meeting, the Court explained:

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's pres-

> ence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore . . . present here.

Id. at 260-61.

The Court found that providing a union representative during an investigative interview effectuates some of the primary purposes of § 1, 29 U.S.C. § 151, of the Act.[2] *Id.*, at 262. Such protection, the Court reasoned, is consistent with the Act's goal of eliminating the "inequality of bargaining power between employees . . . and employers." As Justice Brennan explained for a majority of the Court:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A

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[2]The majority's suggestion that § 1 grants an individual employee his personal choice of union representation, *see ante* at 10, is misplaced.

Section 1 declares it the policy of the United States to eliminate hindrances to the "free flow of commerce" generally by encouraging collective bargaining and "the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing.*" 29 U.S.C. § 151 (emphasis added). This right to designate representatives arises in the context of the collective activities of workers in a group. As Justice Marshall explained in a case decided the day before *Weingarten*, the NLRA, to secure the collective strength of the bargaining unit, establishes a regime of majority rule wherein the rights of some individuals might be subordinated to the interests of the majority. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975).

> knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

Id. at 262-63. Thus, the Court found that affording a "lone employee" a union representative during an investigatory interview in which the risk of discipline reasonably inheres falls within the protection of § 7 "read in the light of the mischief to be corrected and the end to be attained." *Id.* at 262.

By enforcing the Board's decision in this case, the majority establishes a new right for individual employees that is untethered from § 7 of the Act and is not envisioned by *Weingarten*. Whereas the *Weingarten* rule and § 7 are designed to allow employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," the majority's "Representation Rule" fails to effectuate any collective right of employees. Instead, the majority's holding guarantees each individual employee the right to choose a particular union representative he or she desires, even when, as is in the instant case, that particular representative is not as available as another competent and duly elected union representative and when the employee has no material basis for insisting on one particular representative over another.[3] This new right that the majority creates does not advance the collective interests of the bargaining unit.

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[3]There are, no doubt, instances when an employee would have a material reason for preferring one representative over a proffered representative. If, for instance, the employee and the proffered representative have a long history of animosity toward each other, the employer, after being informed of this circumstance, should replace the proffered representative with another representative. This replacement would be required not only because the proffered representative would be biased against the

The majority asserts that granting an individual employee the right to demand one qualified, duly elected steward over another will help mitigate the inequality between employer and employee and will make the employee "generally feel more comfortable." *See ante* at 10, n.11. As for the first purported justification, if both stewards are competent and duly elected by the bargaining unit, allowing the individual employee to choose one over the other does not benefit the collective interests of the bargaining unit in the slightest. One competent, duly elected steward mitigates the inequality between employer and employee just as much as any other steward. As for the second purported justification, making an individual employee "generally feel more comfortable" is not the important type of right that § 7 and the *Weingarten* rule are intended to protect.[4]

The *Weingarten* rule stands for the weighty proposition that an employee should not be forced to undergo an investigatory interview without the assistance of a union steward, who ensures that both the employee and the bargaining unit are treated justly. The majority's new rule

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individual employee but also because the proffered representative's bias could affect his ability to represent the interests of the unit as a collective whole during the investigatory interview. No such circumstance exists in this case. If it had, it would be consistent with the *Weingarten* rule and § 7 to require the replacement "in the light of the mischief to be corrected and the end to be attained."

[4]The majority also asserts that the "Representation Rule" is justified because it would allow an employee to choose a steward who is already familiar with his case. That simply is not the type of important right protected by *Weingarten*. In fact, the ALJ in this case found it unimportant that a particular steward might already be "up to speed." J.A. 13. The type of prompt, nonadversarial interview envisioned by *Weingarten* does not require that a steward have in-depth knowledge about the incident under review.

does not advance the interests of the bargaining unit as a whole. Therefore, the "Representation Rule" exceeds the scope of § 7 of the Act and is an impermissible extension of the *Weingarten* rule.[5] *See Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").[6]

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[5]We are obliged to uphold the Board's interpretation of a statute only if it is rational and consistent with the Act. *See Sam's Club v. N.L.R.B.*, 173 F.3d 233, 238 (4th Cir. 1999). Reviewing courts are not to stand aside and rubber stamp Board determinations that are contrary to the language or tenor of the Act. *Weingarten*, 420 U.S. at 266.

[6]Moreover, I dissent because the majority's "Representation Rule," even if it could be construed as a permissible interpretation of § 7, cannot be enforced retroactively against Busch. An important consideration in determining whether to give retroactive application to a new rule is deciding whether the rule proposed is an "abrupt break with well-settled policy" or is merely an "attempt to fill a void in an unsettled area of law." *ARA Services, Inc. v. N.L.R.B.*, 71 F.3d 129, 134 (4th Cir. 1995).

The Board's most recent pronouncement in a *Weingarten* rule case was *Williams Pipeline Co.*, 315 N.L.R.B. 1 (1994). In *Williams*, the employee being investigated asked for a union steward who was not immediately available. In deciding the case, the Board reaffirmed its prior decision in *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276 (1977). In *Coca-Cola*, the Board held that an employer is not required to postpone an investigatory hearing when the employee asks for a particular union representative who is unavailable, if there is another qualified union representative available.

Because *Williams* was the most recent decision by the Board prior to the Lamirande incident, Busch was entitled to rely on it and the prior Board decisions, like *Coca-Cola*, consistent with it. Therefore, even if the majority's "Representation Rule" were a permissible interpretation of § 7, it constitutes an abrupt reversal of prior policy that may not be applied retroactively.

II.

I also dissent because the facts of this case reveal that Busch afforded Lamirande all the important protections that § 7 of the Act and the *Weingarten* rule provide. Lamirande, who soon before this incident was elected as a union steward,[7] was accused of endangering the safety of other workers at the Busch plant. Busch chose to interview Lamirande about the incident, even though it was not required to under the law. Instead, it could have immediately commenced a disciplinary proceeding. *See Weingarten*, 420 U.S. at 259.

Lamirande asked that Steward Finn be called to represent him during the interview. Instead, Steward Vogel was summoned to the meeting to represent Lamirande. Busch did not summon Steward Finn because he was scheduled to be at lunch. The ALJ found that Busch had a logical reason for not calling Steward Finn. He also found that both Steward Vogel and Steward Finn were competent stewards, and that Busch had no ulterior motive in wanting Steward Vogel to represent Lamirande rather than Steward Finn. Steward Vogel was duly elected by the workers in Lamirande's department and had regularly represented workers during investigatory interviews.

Once Steward Vogel arrived, he was given an opportunity to speak privately with Lamirande. Lamirande told him that he preferred Steward Finn because he was already "aware of my situation." J.A. 10. There is no evidence in the record, however, that Steward Finn was aware of Lamirande's situation until after the first interview. The ALJ also found that Lamirande never told

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[7]His term as steward commenced the month after this incident.

Busch any reason why he wanted Steward Finn rather than Steward Vogel to represent him. As the ALJ found: "Lamirande asked for union representation and got it promptly." J.A. 11.

The ALJ assumed that the interview began at 11:15 a.m. and that, had the interviewer granted Lamirande's request for Steward Finn, the interviewer would have had to wait only 15 minutes until Steward Finn returned from lunch. The ALJ found that this "short delay" was not a sufficient reason to deny Lamirande's request.[8] The ALJ found that, even though Steward Finn was on lunch break, he was not any less "available" than Steward Vogel. J.A. 13.

The ALJ clearly erred in deciding that Steward Finn was not less "available" than Steward Vogel. The interview began before Steward Finn was scheduled to return from lunch. The interviewer was prepared to proceed when Steward Vogel was present but Steward Finn was not.[9]

[8]The ALJ also decided that Busch should have delayed the interview and that nothing about the circumstances required instant attention. Busch asserts correctly that these are legitimate prerogatives reserved to the employer under *Weingarten*.

[9]The majority contends that three prior Board decisions on which it relies require only that the requested representative be "reasonably" available. *Ante* at 14. This characterization is incorrect. In *GHR Energy Corp.*, 294 N.L.R.B. 1011 (1989), the requested representative arrived at the interview before the representative proffered by the employer. In *New Jersey Bell Telephone Co.*, 308 N.L.R.B. 277, 282 (1992), and *Consolidation Coal Co.*, 307 N.L.R.B. 976, 978 (1992), the requested representatives were "equally available" and "present and ready to go forward."

The majority's mischaracterization is further evidenced by the Board's decision in *LIR-USA Manufacturing Co.*, 306 N.L.R.B. 298 (1992). In that case, the Board did not give any weight to the employee's preference for one steward over another steward when the requested steward was not available within five minutes.

Steward Finn was not "equally available" as Steward Vogel.[10]

At no time during the course of these interviews did anyone suggest that it was a *Weingarten* violation for Busch to provide Steward Vogel rather than Steward Finn. In fact, it was not until after the Region refused the union's request to issue complaint over Lamirande's suspension that the *Weingarten* issue was raised.

To suggest that Busch somehow tried to intimidate or overpower Lamirande or tried to disadvantage him during the two interviews by not allowing him to have Steward Finn as his representative lacks any support in the record. There was clearly no "mischief to be corrected" by having Steward Finn rather than Steward Vogel represent Lamirande. All the underlying policy reasons for the *Weingarten* rule were attained, *i.e.*, Steward Vogel safeguarded not only the particular interests of Lamirande but also the interests of the entire bargaining unit by ensuring "that [Busch did] not initiate or continue a practice of imposing punishment unjustly."

[10]The majority asserts that the ALJ was in a better position to assess the respective availability of the two stewards and therefore substantial evidence exists in the record justifying the ALJ's finding that Steward Finn was not less "available" than Steward Vogel. *Ante* at 12, n.14.

"Availability" has had a distinct meaning under the *Weingarten* rule cases. For example, a particular steward is "available" when he or she is "present and ready to proceed." See cases cited *ante* at 27, n.9.

The ALJ ignored this accepted definition. Instead, the ALJ found that Steward Finn was no less "available" because he could have been present after a "short delay."

The only evidence in the record, however, is that Steward Finn was not present and ready to proceed when Steward Vogel was present and ready to proceed. Thus, there is no evidence to support the ALJ's finding that Steward Finn was no less "available."

Weingarten, 420 U.S. at 260-61. Because Lamirande was competently represented in both interviews by a duly elected steward, he was not the "lone employee" whom *Weingarten* and § 7 protect.

III.

Finally, the majority's "Representation Rule" is inconsistent with the important protections the *Weingarten* rule was intended to foster. As the majority rightly notes, an employer is not obligated to summon a particular steward requested by an employee under any circumstance. *Ante* at 10-11, n.11. Instead, the employer has the prerogative to forgo the interview process altogether and proceed to discipline the employee immediately. The Court in *Weingarten* understood the disadvantages of this scenario. By establishing the *Weingarten* rule, the Court attempted to create a policy that was "useful to both employee and employer." *Weingarten*, 420 U.S. at 262. The Court explained the benefit of the rule:

> A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point,

> however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

Id. at 263.

The "Representation Rule" adds an unnecessary complication to what the Court envisioned as a streamlined system of dispute resolution. Instead of "getting to the bottom of the incident occasioning the interview," the new rule announced today will inevitably give rise to new disputes like what constitutes an "extenuating circumstance" and how long must the interviewer wait before proceeding with the interview. These disputes will arise even in cases like this one, where the employee demanding a particular representative will receive no additional benefit from and has no material reason for making such a demand. Employers may well find it much more desirable to bypass the interview process and proceed to discipline. This result is inconsistent with the goals of the *Weingarten* rule and § 7 of the Act.[11]

[11]The majority suggests that it lacks authority to stop such an undesirable result, because Congress has delegated such policy considerations to the Board. *Ante* at 12-13, n.15. As previously explained, *ante* at 25, the court is not allowed to merely rubber stamp the Board's interpretation of a statute. Instead, a court must judge an agency's interpretation against the Supreme Court's prior determination of the statute's meaning. *Maislin Industries*, 497 U.S. at 131. In *Weingarten*, the Supreme Court clearly promoted the investigatory interview as a prompt, efficient, desirable means of handling disputes for both the employer and the employee. *Weingarten*, 420 U.S. at 262-63. The "Representation Rule" might cause employers to bypass the interview process and thereby disadvantage employees. This potential further suggests that the "Representation Rule" is not a permissible interpretation of the Act.

IV.

Today, the majority coins the phrase "Representation Rule" to designate the new rule that it announces. This redesignation is warranted because the "Representation Rule" is an impermissible extension of the *Weingarten* rule.

For all of the above reasons, I respectfully dissent from the majority's denial of Busch's petition for review and its grant of the Board's cross-application for enforcement as to both of the Lamirande incidents. The majority's new "Representation Rule" exceeds the reach of § 7 of the Act.

APPENDIX B - DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED DECEMBER 19, 2001

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Anheuser-Busch, Incorporated *and* International Brotherhood of Teamsters, Local Union No. 1149.
Cases 3-CA-21796, 3-CA-21906, and 3-CA-22112

December 19, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On July 7, 2000, Administrative Law Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Drywall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Anheuser-Busch, Incorporated, Baldwinsville, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 19, 2001

Peter J. Hurtgen, Chairman
Wilma B. Liebman, Member
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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[2] Chairman Hurtgen does not pass on the issue of whether employee Brian Meany was insubordinate at Respondent's corporate communications meeting, to the extent that Meany spoke about contract issues at that meeting. In this regard, Chairman Hurtgen notes that Respondent began its meeting by saying that there would be no discussion of contract matters. However, even if Meany were insubordinate at this meeting, this would not privilege Respondent's postmeeting broad admonition to Meany that he would be fired if he were to "ever speak again at a communications meetings."

[3] We shall modify the judge's notice to employees to conform with the Board's standard language.

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to allow a requested steward to represent an employee absent extenuating circumstances, in violation of the employee's rights under Section 7 of the Act.

WE WILL NOT threaten or discharge an employee if he or she engages in concerted protected activity, including speaking at corporate communication meetings.

WE WILL NOT threaten an employee with reprisal for filing charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ANHEUSER-BUSCH, INCORPORATED

Beth Mattimore, Esq., for the General Counsel.

James W. Bucking and *Arthur G. Telegen, Esqs.*, of Boston, Massachusetts, for the Respondent.

Michael A. Kafoury, Esq., of St. Louis, Missouri, for the Respondent.

Mimi C. Satter, Esq., of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Syracuse, New York, on March 8-10, 2000. The charge in Case 3-CA-21796 was filed by the International Brotherhood of Teamsters, Local Union No. 1149 (the Union), on March 1, 1999. The charge in Case 3-CA-21906 was filed by the Union on April 29, 1999. The charge in Case 3-CA-22112 was filed by the Union on September 8, 1999. On December 2, 1999, the Regional Director for Region 3 issued an Order further consolidating cases, second amended consolidated complaint and notice of rescheduled hearing (the complaint). The complaint alleges that Anheuser-Busch Incorporated, of Baldwinsville, New York (Busch or Respondent) engaged in certain conduct in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed a timely answer in which it denies that it has violated the Act, but admits certain allegations including the jurisdictional allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent, the Charging Party, and the General Counsel on or about May 16, 2000, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with its principal office and place of business in St. Louis, Missouri, inter alia, operates a brewery in Baldwinsville, New York. This brewery is the facility involved in the instant proceeding. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Issues to be Decided

The Respondent has 12 breweries throughout the United States. All of the production employees and most of the maintenance employees at each of these breweries are represented by the Teamsters Union. The representation at each brewery is joint, between the national "Brewery Conference" and the appropriate local of the International Brotherhood of Teamsters. At the Baldwinsville brewery, the employees are jointly represented by the Brewery Conference and Teamsters Local 1149.

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[1] Respondent filed an unauthorized reply brief, to which the General Counsel and the Charging Party object. It is stricken.

In Baldwinsville, Respondent recognized the Union immediately on its purchase of the facility from Schlitz, hired all its employees, and negotiated a successor contract. The last contract between the Respondent and the Teamsters expired on or about February 28, 1998. The contract was extended to March 27, 1998. Negotiations for a new contract had begun in November 1997 and continued through September 1998. Prior to September, in July 1998, Respondent indicated to the Teamsters that it would likely implement its last offer, and held out the offer of an arbitration process that would survive implementation. In September it did implement its last offer. At the time of the implementation, some breweries accepted Respondent's proposed arbitration offer. Others, including the Baldwinsville brewery, did not. The Baldwinsville brewery ultimately did accept the procedure, but at a time following the matters involved in the instant complaint. Hence, these matters are not subject to arbitration.

Most of the issues involved in the complaint arose at a time following Respondent's implementation of its final offer, and when there was no contract or arbitration agreement in place at the Baldwinsville facility. Certainly at least some of Respondent's unionized work force at Baldwinsville were unhappy with this situation. This unhappiness appears to be the driving force behind the events which led to this proceeding.

Other than arising in a atmosphere affected by the status of the contract negotiations, the alleged violations of Section 8(a)(1) of the Act are discrete acts having no real relationship to one another and will be discussed separately below. The complaint alleges at paragraph VI:

a. On or about December 16, and 17, 1998, Respondent denied the request of its employee Patrick Lamirande to be represented by a Union representative of his own choosing, during interviews.

b. Respondent employee Patrick Lamirande had reasonable cause to believe that the interviews described immediately above would lead to disciplinary action being taken against him.

c. On or about December 16, 1998, Respondent conducted the interviews described above with its employee Patrick Lamirande, even though Respondent had denied the employee's request for the Union representation of his choosing.

The complaint further alleges in paragraph VII:

a. In or about early February 1999, Respondent by Art Lux, Assistant Bottling, Shipping and Packaging Manager, and Daniel Robinson, Supervisor, threatened an employee (Joseph Rimualdo) with unspecified reprisals for engaging in the protected concerted activity of filing safety grievances.

b. On or about February 12, 1999, Respondent, by Mark Sammartino, Brewmaster, and M. Larry Harmon, Human Resources Manager, threatened an employee (Brian Meany) with discharge for engaging in the protected concerted activity of voicing opinions about collective bargaining negotiations at a corporate communications meeting.

c. On or about February 12, 1999, Respondent, by Mark Sammartino, threatened an employee (William Parks) with unspecified reprisals for engaging in the protected concerted activity of voicing opinions about collective bargaining nego-

tiations at a corporate communications meeting.

d. On or about August 25, 1999, Respondent, by Art Lux, threatened an employee (Joseph Rimualdo) with unspecified reprisals because the employee had given testimony to the Board during a prior investigation.

B. Resolution of the Issues Raised by Paragraph VI of the Complaint

The sole issue raised by this complaint allegation is whether an employee is entitled under *Weingarten*[2] and subsequent Board cases, to request and be provided a specific union representative in a situation where *Weingarten* applies. The Region, the Charging Party, and the Respondent agree that Respondent and the Union have resolved this issue for the future by mutual agreement that Respondent will honor an employees request for a specific representative if that person is available. However, no party to this proceeding was willing to settle this portion of the case or withdraw it, so I will make findings on the facts presented.

Patrick Lamirande was a production operator for Respondent at its Baldwinsville, New York facility from June 3, 1993, until he was discharged on April 14, 1999.[3] In mid-December 1998, as pertinent, management in his department included Assistant Beer, Packaging and Shipping (BP&S) Managers Art Lux and Ken Silva, and BP&S Supervisor Mark Burlingame.

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[2] 420 U.S. 251 (1975).

[3] There is no nexus asserted between the events involved in this proceeding and Lamirande's termination.

Lamirande had just been elected to be a union steward, with his term to commence in January 1999. The election involved three candidates for two positions. Lamirande, Joe Sankowsiki, and incumbent steward, Fred Vogel, were these candidates. The other incumbent steward, Dan Finn, did not run. Lamirande and Sankowski were elected to a term commencing in 1999 and Vogel lost his position.

At the time of the incidents in question, there were two stewards on duty, Dan Finn and Fred Vogel. There is no evidence to suggest that either steward was less than competent in the performance of steward's duties. Lamirande testified that he personally believed Finn to be a better steward. Finn testified that though Vogel was a good steward, that he, Finn, was more aggressive.

On December 15, 1998 Lamirande engaged in certain conduct that allegedly endangered employees of a contractor working in the facility and hampered the work of the contractor, adverse to the interests of Respondent.[4] This conduct ultimately resulted in Lamirande's suspension for 2 weeks. As we are not litigating the lawfulness of the suspension, suffice it to say Lamirande's adverse conduct was serious and that everyone involved in the incident was aware of the potential consequences of his actions. They were certainly of a nature that discipline was a certain consequence in the event Respondent believed Lamirande had taken the actions he was accused of taking.

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[4] All dates in the remaining portion of this section of the decision are in 1998 unless otherwise noted.

1. Events of December 16

Having allegedly engaged in this conduct, Lamirande was approached on December 16 by Mark Burlingame and Art Lux. There are as many versions of what occurred in this meeting as there were participants. As I will find at a later point, the variations do not bring into question the credibility of the participants on any material point nor do they affect my ultimate findings to any significant degree.

According to Lamirande, Burlingame asked if Lamirande had a problem with the contractors working in the facility. According to Lamirande, he denied having a problem. Burlingame recited the contractor's allegations against Lamirande. Lamirande asked if Burlingame were accusing him of taking the alleged actions, and Burlingame said he was. Lamirande testified that he then asked to see his shop steward, naming Dan Finn.

Burlingame remembered approaching Lamirande at 11:15 a.m. He asked Lamirande what was going on and Lamirande immediately said he was not talking without a union steward. Burlingame and Lux moved away and Burlingame called line Supervisor Manny Ramirez on his radio and told him to bring a steward to him. Burlingame did not remember specifying which steward to bring, but testified it would have to have been Vogel because he knew that Finn was at lunch. Lux testified that they specifically asked for Vogel because they knew Finn was on break. Finn takes lunch at 11 am regularly and at 11:15 a.m. would be on lunch break. His lunch period would normally end at 11:30 a.m.[5]

[5] Finn testified that he heard the radio call for Vogel about 11:35 a.m., after he was back at work. Vogel testified that on more than one occasion, he has represented an employee on his lunchbreak. Finn testified that he too had represented an

When Vogel arrived, he talked with Burlingame.[6] Burlingame testified that he told Vogel what Lamirande had been accused of doing. The three then went to Lamirande. Lamirande immediately asked for Dan Finn. Burlingame testified that he told Lamirande that Finn was at lunch and they needed to get to the bottom of the situation. Burlingame said he remained business like while Lamirande got rude.[7] After a few questions that Lamirande refused to answer, Burlingame gave him a final chance to answer. According to Burlingame, Lamirande said, "]B]lah, blah, blah, blah." Burlingame told Lamirande that it was 11:45 a.m. and he should go home.

Vogel remembers speaking briefly with Burlingame and then privately with Lamirande. According to Vogel, Lamirande said, "No offense against you Fred, but I would like to see Dan Finn because he is aware of my situation." Vogel went back to Burlingame and asked him to try to get Finn to represent Lamirande. Burlingame, looking upset, said that Vogel was there and they were going to proceed. Vogel reiterated his request to get Finn. However he stayed as Burlingame began asking Lamirande questions. Lamirande steadfastly refused to answer them, repeating that he wanted Finn present.

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employee on his lunch break. On at least two prior occasions Vogel had been called to represent an employee who requested another steward. In each case, the Respondent denied the request and Vogel represented them. Vogel regularly represented employees in investigatory meetings.

[6] Vogel testified that he was working that morning and heard his name spoken on his radio. Almost immediately thereafter, at about 11:25 or 11:30 a.m. in the morning, Supervisor Ramirez came and took him to a meeting with Lux, Burlingame and Lamirande.

[7] According to Lamirande, though Burlingame had begun their conversation in a business-like manner, Burlingame became angry and agitated.

Vogel remembers the meeting ending with Burlingame stating that he was giving Lamirande a direct order and that if he did not settle the matter immediately, he was being sent home for insubordination. Lamirande continued to refuse to answer questions and continued to request the presence of Finn. He was sent home.

Vogel then went to lunch. Vogel testified that he passed Finn who was working, and told him about the interview with Lamirande. Finn testified that after Vogel had told him what happened, he went to see Burlingame and asked why he was not called to represent Lamirande. Burlingame told him that he had assumed Finn was at lunch. Finn told him he had assumed incorrectly, and that Burlingame had violated Lamirande's *Weingarten* rights by not releasing Finn to represent him. Finn added that Burlingame could have asked Ramirez over the radio if Finn were at lunch. Burlingame shrugged and the meeting ended. Burlingame denies having this conversation with Finn and I credit his denial. The charge from which this complaint allegation arises concerns Lamirande's suspension. No *Weingarten* violation was raised by the Region until after the Region refused to issue complaint over the suspension. No one, other than Finn, even claimed to have accused Respondent of violating *Weingarten* rights while the incidents in question were taking place.

2. Events of December 17

The next day, Vogel came to work and encountered Howard Ormsby, acting business agent for the Union that day. He told Ormsby about the events of the previous day and asked that Ormsby find Lamirande and talk with him. Vogel was then told to report to the office for a meet-

ing. Lamirande reported to work on December 17 and his supervisor informed him that he was to report to the office for a meeting. Before he went to the office, he ran into Ormsby. Lamirande informed Ormsby about his predicament and asked that Ormsby accompany him to the meeting. He also told Ormsby that he wanted Dan Finn at the meeting. Lamirande testified that he still wanted Finn to help even after he had secured Ormsby's representation. He draws a distinction between Ormsby's and Finn's roles. He testified that Finn was elected by the membership to represent them in grievances and Ormsby was elected to deal with the month-to-month business of the Union. According to Lamirande, Ormsby did not get involved in the grievance procedure in his role as acting business agent. On the other hand, the acting business agent or business agent is involved at step 2 of the Busch's grievance procedure and should be experienced in such matters. Further, Ormsby had previously served as a shop steward at Busch's Baldwinsville facility.

Ormsby and Lamirande started for the office. They encountered Dan Finn who informed them he was not being summoned to represent Lamirande.[8] With this knowledge they went to the meeting. When they arrived,

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[8] Finn testified that on this date at 7:15 a.m., he was relieved on his job and told to see Lamirande in the warehouse. He met Lamirande who told him what had happened the previous day. Finn next met Ramirez about 8 a.m. and Ramirez told him that he was going to be in a meeting about Lamirande at 9 a.m. Just before 9 a.m., Ramirez returned to tell Finn that he, Ramirez had just been told that Finn was not going to the meeting. At this point, he saw Lamirande and Ormsby and informed them that he was not being released to go to the meeting. I believe that Finn told Lamirande and Ormsby he was not going to the meeting. I do not credit and do not believe the remainder of Finn's testimony set out in this footnote. It does not comport with the testimony of Ormsby or Lamirande.

present were Vogel, Burlingame, Lux, and Ken Silva, assistant bottling, shipping, and packaging manager. The men greeted one another, then Ormsby requested that Dan Finn be present. Silva left the room at this point, returning about 5 minutes later with word that Finn would not be called. Ormsby asked again for Finn and Silva refused the request.[9]

Silva testified that in response to Ormsby's request, he told Ormsby that this was an investigatory meeting and Vogel was already there. Silva said he did not see the need to get Finn. Ormsby pressed the issue and Silva called Baldwinsville Human Resources Manager Larry Harmon to discuss the request. They decided that since Vogel had handled the matter the day before, he would continue to handle it.[10] Silva testified that he had been told by Lux that Vogel was picked because Finn was at lunch.

Lamirande was asked questions tracking the contractor's allegations. Both Ormsby and Vogel participated in the meeting, asking questions and representing Lamirande. The meeting ended with Burlingame telling Lamirande that he had no defense to the allegations and he would be disciplined. I cannot find in the record where either Lamirande, Vogel or Ormsby ever articulated any reason why they wanted Finn to represent Lamirande.

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[9] Vogel remembered Silva telling Ormsby that Finn was not available.

[10] Burlingame testified that he initially made the decision to have Vogel at this meeting because he had been at the meeting the previous day. Vogel already knew what the accusations were and in Burlingame's estimation, was "up to speed" on the issues.

3. Conclusions

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975), the Supreme Court held that an employee had the right to union representation at "an interview which he reasonably fears may result in his discipline." The Court feared that a "lone employee" confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-263. The presence of "[a] knowledgeable union representative" would protect the employee from being overpowered by the employer and assist the investigation. *Id.* at 263.

All parties agree that Lamirande was in a *Weingarten* situation December 16, 1998, when he was confronted by Lux and Burlingame. They were clearly going to conduct an investigatory interview that could clearly result in discipline. Lamirande asked for union representation and got it promptly. The question presented by the evidence and complaint is whether *Weingarten* and its progeny require the employer to provide a specifically requested steward rather than one of its choosing.

It is not altogether clear whether Lamirande had requested Finn when he first asked for union representation or whether he first asked for Finn after Vogel arrived. For the purposes of this decision, I am assuming and find that he did ask for Finn before a steward was called. Burlingame did not call Finn to the meeting because he believed Finn was at lunch. I find nothing in the record to raise a doubt about the truthfulness of this reason. Finn was scheduled to be at lunch at the time a call for a steward was made. Thus, Respondent had a logical reason for selecting Vogel to represent Lamirande.

There is no evidence in the record to suggest that Vogel was not a competent steward. He was duly elected to the steward position by the workers and was experienced in the job.

If this issue is decided by the Board on appeal, I believe it should be clear that this is a straightforward question concerning the limits of an employee's rights under *Weingarten*. There is no evidence that Respondent had any ulterior motive in using Vogel at both meetings. There is no question in my mind that Lamirande received adequate representation from Vogel in the meeting of December 16 and from Vogel and Ormsby in the meeting on December 17.

The General Counsel asserts on brief that Respondent's past practice was to honor employees' requests for specific stewards in a *Weingarten* setting. I do not believe this to be true. Vogel testified that on two occasions in which an employee he was called to represent asked for another steward, that request was denied. Counsel for the Union and Respondent agreed on the record that subsequent to the incident in question, the parties agreed that in the future, an employee's request for a particular steward would be honored unless the steward requested was unavailable. This understanding was not shown to be in place on December 16 and 17. Therefore, I find that Burlingame did not violate past practice when he called Vogel instead of Finn.

The parties have cited a number of cases dealing with the involved issue in slightly different factual situations. It appears to me that by adoption of the decisions of various administrative law judges, the Board, without comment has broadened the rights of employees under *Weingarten*. In *Pacific Gas & Electric Co.*, 253 NLRB

1143, 1143 (1981), the Board was faced with a situation where the respondent had two facilities, a powerplant and a tank farm, in which its employees worked. The facilities are about 20 minutes apart by car. Respondent refers to the powerplant as the onsite facility and refers to the tank farm as the offsite facility. Each site has two union stewards. The practice of the Respondent was to provide the onsite stewards to employees working in the power plant and the offsite stewards for employees working at the tank farm. When a powerplant employee (Green) requested a tank farm or offsite steward (Lee) for an investigatory interview, the Respondent refused and provided an on site-steward instead. The Board found Respondent's action lawful. It stated:

> On these facts, the Administrative Law Judge concluded that Respondent did not violate Section 8(a)(1) of the Act by refusing Green's request for Lee's representation. For this finding, he relied on *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977). In that case, an employee requested representation by a vacationing steward even though the employee knew that another representative was available. The meeting occurred on Friday afternoon and the vacationing steward was not due back until the following Monday morning. The employer denied the employee's request for the absent steward and proceeded with the interview. The Board held there that where another union representative was available, but the employee did not request him, the employer did not violate Section 8(a)(1) of the Act by proceeding with the interview in the absence of a representative.
>
> We agree with the Administrative Law Judge, that *Coca-Cola* is controlling here. Member

> Jenkins, however, dissents, as he did in *Coca-Cola*, since he believes that *Weingarten* requires an employer to provide the employee with the representative of his choice, regardless of how long the employer would have to delay the interview.
>
> With all respect, our dissenting colleague's view seems to be inconsistent with both the legal and policy principles contained in *Weingarten*. The Supreme Court in *Weingarten* neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a *specific* representative sought by the employee. To the contrary, the focus of the decision is on the employee's right to the presence of a union representative designated by the union to represent all employees.... Our interpretation of *Weingarten* must be tempered by a sense of industrial reality. We do not advance the effectuation of employee rights, or contribute to the stability of industrial relations, if we complicate the already complex scheme of *Weingarten* by introducing the notion that an employee may request this union representative instead of that one, perhaps from a far corner of the plant, and perhaps, in certain instances, contrary to the union's wishes. In the instant case, a duly designated union representative was ready, willing, able and present. We would inquire no further.

The Board's position in *Pacific Gas & Electric*, supra, is inferentially supported in *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992). Therein, in a case where the respondent provided a qualified representative other than the one specified by an employee in a *Weingarten* situation, the General Counsel conceded that by providing an available, qualified representative rather than the

requested, less readily available representative the Respondent met its *Weingarten* obligations.

The state of the law being examined here becomes less clear when one reads *Consolidation Coal Co.*, 307 NLRB 976 (1992). There the Board adopted without comment the decision of the administrative law judge. There a respondent denied an employee's (Knisely) request for representation by an experienced union representative (Tarley) who was present and forced the employee to instead choose representation from a group of committeemen, none of whom had ever represented an employee in an investigatory interview. The judge found Respondent's actions in this regard to violate the Act, citing *GHR Energy Corp.*, 294 NLRB 1011 (1989), where a similar violation was found, i.e., it was a violation of the Act to deny an employee his choice of representative, who in that case was from the International union and present, and force the employee to proceed with another representative. In the instant case it would not have been a violation of the act if Respondent denied Knisely's request for representation by Tarley if Tarley was not present and to grant the request would force a postponement of the investigatory interview. See *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977). But in the instant case as in *GHR Energy*. supra, the requested representative was present and ready to go forward. Hence, Respondent violated Section 8(a)(1) of the Act."

In *Kidde, Inc.*, supra, the Board adopted without comment the decision of the administrative law judge, who clearly believed that *Weingarten* and cases following clearly give the employee the right to select the person to represent him or her. The *Weingarten* issue in *Kidde, Inc.*, was only a relatively minor part of a major case involving significant unfair labor practices. The respondent re-

fused an employee's (Simmons) request to have an International union representative (Roan) represent him in an investigatory meeting. Though Roan was present, the respondent refused the request and required Simmons to accept representation by a shop steward. In any event, by adopting the judge's decision, the Board held:

> The General Counsel alleged that GHR on that occasion violated Section 8(a)(1) of the Act by denying Simmons' request for representation by a union representative of his choice. I agree. The Supreme Court and the Board have made clear that the right to request a specific union representative in this case rested with Simmons. In *NLRB v. J. Weingarten*, (citation omitted), the Court approved the Board's view that Section 7 of the Act gives an employee the right to demand union representation at investigatory interviews which he or she reasonably believes will result in discipline. Also, under *Weingarten*, 420 U.S. at 257-258, it is the employee, who is about to undergo the interview, who must request the representation. Further, when the employee makes the request, the employer must either grant it, give the employee the option of going on with the interview unrepresented or waiving the interview, or reject the request and end the interview. Absent is any provision allowing an employer to impose a union representative on an employee.
>
> The Board's decision in *Coca-Cola Bottling Co.*, (citations omitted), suggested that the initiative for selecting a union representative lies with the employee. In that case, the Board held that if the employee requests a union representative, who is not available, the employer can reject the request

and proceed with the investigatory interview without providing another representative or otherwise attempting to satisfy the employer's initial request. However, in *Coca-Cola*, the Board also recognized that in such circumstances an employee had the right to request alternative representation. *Coca-Cola*, supra at 1276.

Applying the foregoing teachings here, I find that Deutsch (employer) impaired Simmons' Section 7 right to specify the union representative he wanted to assist him at the interview on the morning of 17 July. Deutsch imposed steward Kimball upon Simmons, who was attempting to exercise his right under the Act to select the Union's International Representative Roan as his representative. As Roan was available, the interview could have proceeded without delay. That some of Kimball's work time might have been wasted if Deutsch had granted Simmons' request did not warrant Deutsch's rejection of that request. . . .I find that by Deutsch's refusal to permit Gail Simmons to exercise his right to select a union representative in accordance with the *Weingarten* doctrine, GHR violated Section 8(a)(1) of the Act. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

In the latest case cited by the parties, *New Jersey Bell Telephone Co.*, 308 NLRB 277, 282 (1992), the Board stated:

The Judge concluded, and we agree, that when two union officials are equally available to serve as a *Weingarten* representative, ... the decision as to who will serve is properly decided by the union officials, unless the employer can estab-

lish special circumstances that would warrant precluding one of the two officials from serving as representative.

Although I would agree with the Respondent in this case that *Coca-Cola Bottling Co.*, supra, and *Pacific Gas & Electric Co.*, supra, clearly support its position that *Weingarten* does not give the employee the right to select a specific representative, that proposition has clearly been changed by the Board as set out above in *Consolidation Coal Co.*, supra, *New Jersey Bell Telephone Co.*, supra, and *GHR Energy*, supra. The law appears to me to be that in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances. Here there are no such extenuating circumstances for either the December 16 or 17 meetings. I have found at the outset that Lamirande requested Finn at a time before Vogel was called. The only reason advanced for not calling Finn was that he was at lunch. I do not think this reason is sufficient. If the meeting began at 11:15 a.m., as asserted by Burlingame, Finn's lunch break only had 15 minutes to go. Moreover, both Finn and Vogel testified credibly that they had been called away from breaks on previous occasions to represent employees. The short delay that would have occurred if Respondent had honored Lamirande's request, assuming Burlingame waited until Finn's lunch period was over, was not a sufficient reason to deny Lamirande the representation he wanted. There was nothing about the allegations against Lamirande that demanded instant attention. The only meaningful distinction I can find in the later cases I have cited and the

Board's holding in *Pacific Gas & Electric Co.* deals with the matter of "availability." The later cases discussed above seem to stress the importance of fact that the requested representative was present when the request was made. In the instant case, no representative was present when Lamirande requested Finn. I do not believe that the fact that Finn was on lunchbreak for a short period of time makes him any less "available" than Vogel. Therefore, I find that Respondent violated Section (a)(1) of the Act when it denied Lamirande's December 16, 1998 request and refused to call Finn to represent Lamirande.

Respondent also violated the Act on December 17, when it again refused to call Finn to represent Lamirande. It is not sufficient to argue that Lamirande himself did not reiterate the request for Finn on December 17. He had already made it patently clear that he wanted Finn and no one else. That the request was voiced by Lamirande's representatives on December 17 does not change the fact that Lamirande had already made the request personally the previous day. Further, if Respondent had not unlawfully denied Lamirande's request of the previous day, Finn would have been representing him. It is also not sufficient to say that Respondent could deny Lamirande's request to have Finn represent him on December 17 by saying Lamirande had adequate representation. As pointed out by the Board in *New Jersey Bell Telephone Co.*, supra, that decision was for the union officials to make. No special or extenuating circumstances were offered for Respondent's failure to make Finn available on December 17. Respondent asserts that Vogel was the proper person to call as he had represented Lamirande the previous day and was "up to speed." This argument fails for two reasons. First, Vogel only was present the previous day because Respondent unlawfully refused to produce Finn. Second, nothing was

developed in the first meeting that would have brought Vogel "up to speed." Lamirande in that meeting flatly refused to answer questions. Further, Ormsby was not at the earlier meeting and he was Lamirande's chief spokesperson at the second meeting. It would have taken only minutes for Lamirande to give Finn his side of the story to bring Finn "up to speed." Finn had already been briefed by Vogel on what had occurred on December 16 and he was clearly available to represent Lamirande.

I therefore conclude that Respondent violated Section 8(a)(1) of the Act by refusing to provide Finn to represent Lamirande on December 17, 1998.

C. Resolution of the Issues Raised by Paragraph VII(b) of the Complaint

Paragraph VII(b) of the complaint alleges that on or about February 12, 1999, Respondent, by Mark Sammartino, Brewmaster, and M. Larry Harmon, human resources manager, threatened employee Brian Meany with discharge for engaging in the protected concerted activity of voicing opinions about collective bargaining negotiations at a corporate communications meeting.[11] Respondent conducts annual, so-called corporate communications meetings with employees. It sends a senior corporate executive from the St. Louis headquarters who gives all of the employees at Baldwinsville a presentation of the company's performance versas that of its competitors and advises of the corporate goals for the near future. The executive will also discuss the Company's stock performance and its retirement plan. The presentation usually takes about 45 minutes. At the conclusion of the for-

[11] All dates in this section of the decision are in 1999 unless otherwise noted.

mal presentation, the executive entertains questions from the audience.

The employees are divided into three groups, each receiving the same presentation at separate meetings. In 1999, the corporate communications meetings were scheduled for February 11. The executive from St. Louis was Michael Harding, who had recently been promoted to the position of vice president of operations. Also present for the meetings were the Brewmaster Mark Sammartino, Plant Manager Brian McNellis, Human Resources Manager Larry Harmon, and managers from various other departments at the brewery.[12] At each meeting, Harding began his presentation by telling the employees that there would be no references to contract issues. He added the contract issues had been discussed enough so there was no need to discuss them further. He went on to say that Respondent was not trying to avoid the issue, but that it had spent all of 1998 extensively talking about it and it was not the topic of this year's meeting. He explained the purpose of this year's meeting was to discuss the Company's performance, the brewery's performance and initiatives. Aside from this guideline, no restrictions were placed on what could be raised in the question and answer portion of the meetings.

1. Facts relating to Brian Meany's conduct at the February 11 communications meeting

Brian Meany has been employed for 16 years by Respondent in its brewing department. At the time of the 1999 communications meetings, he was and had been for some time a union steward in his department. Meany

[12] The brewmaster and plant manager are co-equals at the brewery and are the two top brewery executives.

attended one of the three meeting conducted by Harding. When the question and answer session began, some employees raised their hands, were recognized, and asked questions. Two employees had asked questions before Meany was recognized and was given a microphone. Meany had not discussed what he planned to say with anyone before he spoke at the meeting. According to Meany, he began by asking Harding if morale concerned him. Harding gave an answer indicating that it was not a major concern. Meany then asked if it concerned him that Respondent had given a big party for employees and only 40 employees showed up. McNellis spoke up and said it was more than 40. Meany countered by saying it was only 30 or 35 and many were new hires. Harding responded that they did not need to get into numbers. Meany then accused Respondent of inflating attendance at the party by giving free tickets to friends and neighbors of the brewery's management.

Meany then offered to tell Harding why employees did not attend the party. Meany said it was not a union thing, that employees did not go because they did not want to go. At this point Meany pulled out a legal pad from his briefcase. Harding admonished Meany to keep his comments brief. Meany began reading a list of 10 symptoms of an abused spouse. According to Meany, he had read two of them and his microphone was turned off. Some in the crowd asked to have it turned on and Harding asked if they wanted to hear more from Meany. According to Meany, the audience responded affirmatively. The microphone was turned back on and Meany finished reading his list. The purpose of Meany's comments was to draw an analogy between Respondent's treatment of its employees with the treatment of a spouse by an abusive spouse. Meany stated that the company's treatment of employees made them feel like they

had on golden handcuffs. This is apparently a reference to the excellent wages paid by Respondent at Baldwinsville. Meany then told Harding that Respondent could not treat people like they had been treating them. Harding asked, "These people?" referring to the Baldwinsville management officials appearing with him. Meany said, "No, St. Louis." Meany put down his legal pad and ended by telling Harding he had a problem. According to Meany, the audience clapped approval and Harding asked the crowd if Meany spoke for them. Meany testified at least three people answered in the affirmative.[13]

Harding then reminded the employees how good their jobs were and how much money they made. Meany interrupted and said, "Like I was saying, honey, you have a roof over your head," again making an analogy to the abusive relationship he discussed in his list." Meany testified that he felt good at this point, having made his point with Harding.

Some other employees asked questions, then one employee showed a list which he represented to Harding as a list of the top 100 places to work, asking Harding why Respondent was not on the list. Harding pointed out how much money the employees made and noted they should be more concerned with the competition than what was being brought up in the meeting.

Meany managed to get recognized again by Harding and said that the contract problems were not about money. A supervisor Meany recognized stood and said, "If

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[13] Brewmaster Sammartino did not remember Harding asking the audience if Meany spoke for them, but did not clearly deny it happened. I credit Meany.

these people don't want to work, don't like it here, just get a job somewhere else." Meany mumbled something about the abusive spousal relationship toward the supervisor. He then said to Harding, "The problem with the contract is that you want us to leave the Union at the door." Meany pointed out an employee who Meany believed had been unfairly treated by management, losing a sick day for punching out one second early. He complained about a company practice of taking holiday pay away if an employee is one minute early leaving before a holiday or a minute late returning from one. He added, "[T]hose are like insurance to us." McNellis looked at him and said, "Nice speech Brian." The meeting ended and Meany was congratulated by some in the audience.

Brewmaster Sammartino testified that during Meany's speech, Harding asked him several times if he had a question. Meany ignored Harding's questions and continued reading about the symptoms of a battered spouse. Harding finally cut him off, saying he would listen to a question. According to Sammartino, Meany started shouting, saying Respondent was out to screw their employees. He referred to Respondent as a beater and a batterer of an abused spouse. After a few minutes, Harding firmly told him to sit down and Meany complied.

2. Facts relating to Meany's February 12 meeting with Brewmaster Sammartino

On the next day, February 12, Meany reported to work. Meany's version of what took place that day follows. On Meany's arrival, he was told by his supervisor and two others present to report to Sammartino.[14] He was

[14] Sammartino had been told by Harding to speak with Meany about Meany's conduct at the communications meeting.

advised by the supervisors to get a steward. Meany had never heard of anyone called to the brewmaster's office for discipline before this. Meany got fellow employee Carl Ritchie to go with him.[15] In Sammartino's office were Sammartino and Human Resources Manager Larry Harmon. Meany asked if this meeting was about the communications meeting the previous day. Sammartino said yes. Meany stated that the employees had a right to talk. Sammartino then said that current meeting was not a communications meeting, this was one for Meany to sit and listen. Sammartino told Meany that for the 3 years he had been Brewmaster, Meany has disrupted the annual communications meeting. Meany responded that he had not been disruptive for three years, only a year and a half. Sammartino referred to a pad and then said, "I want you to know that the work you do on the floor here does not outweigh the things you do in communication meetings. If you speak again at a communications meeting, you will be fired." Ritchie corroborated that Sammartino made this statement. I credit Meany and Ritchie for the proposition that Sammartino threatened Meany with discharge if he spoke again at another corporate communications meeting.

In the meeting with Sammartino, Ritchie supported Meany's view that employees could speak at communication meetings. Meany told Sammartino that if he had restrictions on him, he wanted them in writing. According to Meany, Harmon said, "You know what, you will be fired. Then the Union will go through the grievance procedure and what will happen will happen." Meany testi-

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[15] Sammartino indicated that he had Ritchie come with Meany. Ritchie had been a steward and was occasionally used as one in the absence of a steward. As noted earlier, Meany was a steward.

fied that at this point he believed he was going to be fired. He began telling them how much he loved to work at the brewery, but that they have a problem. According to Meany, Sammartino told him that whatever he had in his head he had to get it out. Sammartino said 90 percent of the employees love working at the brewery and he loves it. Meany started arguing that that was not what he heard on the floor, noting that Sammartino was never on the floor.

Meany again asked for something in writing. According to Meany, Harmon said that he had a representative with him so he knew what was said. Meany told Harmon, "Larry, you need to understand that when I speak I am a Union representative. And when I speak, I speak for the people I represent." He made a comment about the contract negotiations and the meeting ended.

Sammartino testified that he and Meany had had a troubled relationship for 3 years. According to Sammartino, Meany had made Sammartino's life difficult by contesting his authority on many occasions and by Meany's conduct in communications meetings. He considered Meany's actions the day before to the straw that broke the camel's back. Sammartino was upset with Meany and felt it time to state some expectations about his conduct and behavior. He told Meany that his behavior at the meeting was unprofessional and inappropriate. He continued, telling Meany that if he conducted himself in a similar fashion in the future, he would have him removed from the premises and if discipline were necessary, it would be given. Sammartino testified that he objected to Meany being derogatory, noting he did not heed Harding's direction to sit down or ask questions. He objected to Meany's yelling at Harding and being derogatory about management. He considered Meany's actions

to be insubordinate. He did not issue discipline to Meany because he believed Meany deserved to first be given expectations of acceptable behavior.

3. Conclusions with respect to the threat of discharge of Meany

To find that activity is protected and concerted, the Board generally requires that the activity in question be taken (1) "with or on the authority of other employees" (as opposed to "solely by and on behalf of the employee himself") or (2) individually, but with the object of inducing group action or bringing "truly group complaints" to the attention of management.[16] *Whittaker Corp.*, 289 NLRB 933 (1988); *Meyers Industries*, 281 NLRB 882 (1986). Nevertheless, the Board has consistently held, under the latter prong of the definition, that:

> employee questions and comments concerning working conditions raised at a group meeting by an employee clearly come within the definition of concerted activity under Board precedent.

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[16] The most common issue that arises in relation to the concerted analysis is that of prior approval by coworkers. Obviously, if, prior to acting, an individual secures the approval of his/her coworkers, the action will be concerted. However, even in the absence of prior authorization by other employees, if the purpose of the activity was to induce group action (even if ultimately unsuccessful) or bring "truly group complaints" to the attention of management, it will be concerted. *Whittaker Corp.*, supra at 933; *Meyers Industries*, supra, 281 NLRB at 886. Applying this rationale, when an individual speaks on a matter of common concern in a group meeting milieu, even without prior approval, a concerted objective is nevertheless inferred. *Whittaker Corp.*, supra, 289 NLRB at 934.

Neff Perkins Co., 315 NLRB 1229 fn. 1 (1994), citing *United Enviro Systems*, 301 NLRB 942 (1991), and *Whittaker Corp.*, supra.

Once conduct is found to be concerted, it will be afforded the Act's protection, except in the narrowest of circumstances. Specifically, when conduct,

> is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service.

Consumers Power Co., 282 NLRB 130, 132 (1986).

In *F. W. Woolworth Co.*, 251 NLRB 1111, 1112-1113 (1980), the Board found conduct protected despite the fact that an employee repeatedly and loudly insisted on speaking during a group meeting, contrary to the employer's policy prohibiting such, and in contravention of a direct order to cease interrupting by the speaker, the highest ranking manager in the plant.

In the instant case Meany's conduct was clearly not so egregious to take it outside the protection of the Act. When one holds a captive audience meeting with a period for questions and answers, one must expect questions or statements that one might not like. Meany addressed the issue of low employee morale and, based on the audience reaction, had the support of other employees. He mentioned the lack of a contract and a problem with an attendance rule as reasons for the low morale. Though he may have disregarded Harding's instructions to ask a question, or to sit down, nothing he did was anywhere near as insubordinate as the conduct of the employee in *F. W*

Woolworth Co., supra. He certainly was not trying to take over the meeting or purposely disrupt it. Sammartino threatened to discharge Meany if he spoke again at a corporate communications meeting. This threat and the restriction it places on Meany's future activity, imposed because of his protected concerted activity, is in violation of Section 8(a)(1) of the Act. Having heard Sammartino testify, I really believe his overreaction to Meany's conduct in the communications meeting has its genesis in Sammartino's frustrations with Meany on several other occasions. As Sammartino testified, he believed there was a three-year history of bad relations between him and Meany. However, he cannot rely on those bad experiences with Meany to justify a threat for engaging in protected concerted activity.

D. Resolution of Complaint Allegation VII(c)

This complaint allegation alleges that on or about February 12, 1999, Respondent, by Sammartino, threatened employee William Parks with unspecified reprisals for engaging in the protected concerted activity of voicing opinions about collective-bargaining negotiations at a corporate communications meeting.[17] The meeting in question was one of the three held on February 11 by Harding.

1. Facts relating to William Park's conduct at the corporate communications meeting

William Parks has been employed by Respondent in the brewing department since January 1983 and was a shop steward during the year 1999. On February 11, he

[17] All dates in this section of the decision are in 1999 unless otherwise noted.

attended a different, but very similar corporate communication meeting to the one attended by Meany.

When the meeting entered the question and answer phase, one employee asked about early retirement and insurance. Parks raised his hand at some point shortly thereafter and was recognized by Harding. The question about early retirement had provoked laughter from the executives. According to Parks, he told Harding that he took offense. He said there was a serious morale problem. Parks said that he did not know what McNellis was telling Harding, but it seems that there could be better communications and morale. Parks said Harding should be concerned about morale as it affects productivity.

At this point Parks referred to August Busch III, Respondent's CEO, calling him a lunatic, a control freak, and a power freak. He said the executives who come from St. Louis cause the local executives to cringe. He commented the local executives are nervous and jerky until the St. Louis executives leave. He commented that the power August Busch wants is to have employees walk the walk he wants. He ended his tirade by telling Harding that there are a lot of people pissed off at the brewery. Parks then sat down.

After the meeting, Parks went to Harding and congratulated him on his promotion. Parks testified that at this one on one meeting, he urged Harding to look into the matter of morale. He added that the employees were hard workers, not door mats, and would like some respect which was lacking at the facility. McNellis was standing nearby and Park invited him to jump into the conversation. McNellis said nothing.

In addition to Parks's description of what he said, Sammartino testified that that Parks was yelling and gesturing. He referred to the managers at the brewery as being incapable of dealing with issues. Sammartino remembered Parks calling McNellis an asshole. He said the management team was out to screw the employees. Though agreeing that Parks made derogatory comments about August Busch III, an employee attending the meeting did not remember Parks cursing or calling anyone an asshole. I credit Sammartino.

2. Facts relating to Parks' meeting with Brewmaster Sammartino on February 12

On February 12, Sammartino came to work and found Parks sitting outside his office. Sammartino had not asked to meet with Parks, though he planned on calling him in later that morning. Sammartino greeted him and asked him what he wanted. According to Sammartino, Parks said he was sorry for the way he conducted himself the previous day. He told Sammartino that it was not his intention to embarrass Sammartino. Sammartino asked him what point he had been trying to make at the meeting as it was not clear. Parks finally explained that he did not understand and was upset with the company's absenteeism program. Sammartino explained why it was necessary.

Sammartino then told Parks that he had been out of line and that it was Sammartino's expectation that he would not conduct himself again in the manner he had in the communications meeting. He told Parks that if he had issues, he could discuss them with Sammartino at any time. Sammartino testified that the meeting ended on a friendly note. No discipline was issued to Parks because of his actions at the meeting.

Parks testified that he reported to work the next day and was congratulated on his speech by other employees. He was also instructed to report to Sammartino's office. He went to the office and found Sammartino sitting at his desk. According to Parks, Sammartino did not say anything for twenty seconds or so. Park asked if the meeting was about what had occurred the day before, and Sammartino indicated it was. According to Parks, Sammartino told him that there would be some "fucking corporate vice-president calling me and chewing my ass out." Parks said that he had not mentioned Sammartino's name at the communication meeting and was only talking about plant morale. Parks testified that Sammartino said he was going to be chewed out because what Parks said did not make him look good with his bosses. According to Parks, Sammartino said that St. Louis would want to know Park's name. Parks testified that Sammartino continued by saying that, "Fucking Brian Meany went off the deep fucking end again." Parks again reiterated that the whole plant was talking about morale. The meeting ended and Parks left, glad to leave he testified because Sammartino was really annoyed.

Parks gave two affidavits to the board. In each is a mention of the meeting with Sammartino. One states: "Sammartino, who was clearly upset, informed me that he was unhappy with my action at the prior day's communications meeting. He added that, as a result of my action, he was likely to be chewed out." The other affidavit states: "Sammartino stated that someone from St. Louis was going to chew him out based on my actions at the communications meeting." Neither affidavit mentions the word "fuck," or the word "ass." Sammartino did not tell Parks at this meeting that he was going to take any action against him and there is no evidence that he did.

3. Conclusions with respect to whether Respondent violated the Act

I credit Sammartino's version of the meeting over that given by Parks. The embellishment Parks felt obligated to make about this meeting in his testimony, as compared to his affidavits, indicates to me that Parks is not entirely credible. Nothing in Sammartino's version of the meeting amounts to sanctions or discipline given Parks for his behavior. I believe management has the right to express its displeasure at Parks calling the plant manager an "asshole" and the CEO of the Respondent a lunatic, a control freak and a power freak. Sammartino did not go beyond expressing displeasure, and in no way disciplined Parks for his actions. I think it ludicrous to have Respondent post a notice saying it will not in the future voice displeasure at name calling by employees. Indeed, the Respondent's work rules prohibit such activity and provide for discipline for such conduct. I will recommend this complaint allegation be dismissed.

E. Resolution of Complaint Allegations VII(a) and (d) Relating to Joseph Rimualdo

The complaint alleges at paragraph VII(a) that in or about early February 1999, Respondent by Art Lux, assistant bottling, shipping, and packaging manager, and Daniel Robinson, supervisor, threatened employee Joseph Rimualdo with unspecified reprisals for engaging in the protected concerted activity of filing safety grievances. It further alleges in paragraph VII(d) that on or about August 25, 1999, Respondent, by Art Lux, threatened Rimualdo with unspecified reprisals because the employee had given testimony to the Board during a prior investigation.[18]

1. Joseph Rimualdo files safety grievances

Joseph Rimualdo has worked for Respondent for 13 years in the beer packaging and shipping department. He has been a union steward for 2 years. Rimualdo testified that in January 1999, there were a lot of safety issues in the plant. Employees would come to him and ask how to get safety issues rectified. According to Rimualdo, he documented these issues and spoke with the line supervisor about them. He mentioned Paul Marcuzey, Bruce Hoag, Denny Schuler, and T.J. O'Connell as supervisors he spoke with about safety issues. According to Rimualdo, the procedure for handling safety matters requires that they first be brought to the attention of the line supervisors. He told the supervisors that if the matters were not handled within a few days, he would file a grievance over them.[19]

According to Rimualdo, the safety issues were not addressed so he filed six safety grievances on or about January 28. Rimualdo testified briefly about each one and each seemed to relate to a legitimate safety concern. He testified that he had spoken previously to a supervisor about each of the problems addressed in the grievances and none had been satisfactorily fixed as of the date the grievances were filed.

According to Rimualdo, after the grievances were filed, he was called to the office of Fred Singler, Respondent's bottling, shipping, and packaging manager. Singler is responsible for 39 supervisors and 330 hourly employees. In his department, from top to bottom, there are

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[18] All dates in this section of the decision are in 1999 unless otherwise noted.

[19] The Union files 200 to 300 grievances annually at Baldwinsville and in 1999, filed 211 grievances.

assistant managers, shift superintendents, and first-line supervisors. Singler testified that in January he became aware of the grievances filed by Rimualdo. As luck would have it, he stopped by his secretary's desk and they were there. They were filed as "general" grievances which is a type of grievance that goes directly to step-two level, bypassing first line supervisors and any investigatory meetings. Grievances which fall into the general grievance category are those which involve matters across departments or involve the whole plant, situations in which a first line supervisor would not have the power to resolve the matter.

In the grievance procedure in effect in January 1999 for safety matters, the matter grieved is first brought by the grievance to the attention of his or her immediate supervisor. If the matter is not settled in this fashion, it is brought to the employee's union steward, who meets with the area superintendent. If it is not resolved in this fashion, a grievance is filed. The meeting with the superintendent is typically the step-one level of the process. Singler testified that the grievances filed by Rimualdo were not of the type to be included in the general grievance category and could not bypass first line supervisors. With issues regarding safety, the Respondent has two rules, both requiring safety matters to be immediately brought to the attention of the first line supervisor who is to correct the problem. These rules are contained in the expired collective bargaining agreement and in the Respondent's safety manual.

When Singler learned of the grievances, he called a meeting with Rimualdo and the two managers in whose departments safety issues had been raised. These men were Art Lux and Nick Alivero. Singler's testimony and that of Rimualdo vary over what happened at this meeting. I did not find Rimualdo to be a particularly credible

witness and I did find Singler to be credible. I credit Singer's version of what happened over the testimony of Rimualdo in every regard.

Singler testified that he asked Rimualdo why he had filed general grievances rather than trying to get the problems solved with the line supervisors. According to Singler, Rimualdo said the company had shoved the contract down his throat and that he was only doing what he was told. Singler understood the first part of what Rimualdo stated as contract negotiations had been ongoing for some time and the Company had implemented its last offer. He did not understand the second part until a couple of days later when Steward Pat Lamirande filed nine more general grievances over safety issues.

Singler testified that Rimualdo said he had not spoken to any supervisor about the problems and had written them up as grievances rather than speak with supervisors. In this regard, the grievance forms have a line on which the grievant is supposed to name the supervisor involved in the grievance. Those lines are blank on the grievances filed by Rimualdo.[20] Singler reminded Rimualdo that safety issues are to be first brought to the attention of the line supervisors. He also pointed out that the general grievance process takes about a month or more to accomplish much more time than simply dealing with the problem with the supervisors.

Singler told Rimualdo if the matter could not be resolved by supervisors, then he, Lux or Alivero should be contacted and they would solve the problem. In this

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[20] Rather incredibly, Rimualdo said he did not write in the names of the involved supervisors out of fear that they would get in trouble with higher management.

regard, he assigned Lux and Alivero to go with Rimualdo to inspect the problems set out in the grievances and resolve them. Singler testified that this process was carried out and within days all the safety problems were addressed. A meeting was held on the grievances two weeks later and they were resolved.

Singler testified that as the meeting ended, Rimualdo remarked, "I guess that's strike one against me," and sort of chuckled.[21] Singler replied, "There's no strikes, Joe." He then added that if there is a safety problem, they need to fix it, pointing out that general grievance procedure is not the way to do it as it encumbers the process.

2. Rimualdo is seen drinking a competitor's beer in a local bar

About 4r days after the meeting with Singler, Rimualdo was drinking beer in a tavern near the brewery. Art Lux came in and went to the bar. Rimualdo was drinking a Labatt's Blue beer at the time. Lux saw Rimualdo and came to him, saying, "What are you drinking?" Rimualdo replied, "Labatt's Blue." Lux asked, "You are drinking a competitor's brand?" Rimualdo replied, "Maybe I will keep drinking it until we get a contract." According to Rimualdo, Lux then said, "This is two strikes. You got one for filing safety grievances and you got one for drinking Labatt's Blue." According to Rimualdo this was not a friendly conversation.

Lux testified that when he saw Rimualdo, Rimualdo was drinking a Labatt's. According to Lux, he asked, "What the hell are you drinking a Labatt's for? You work

[21] Though Rimualdo denies making this comment, I do not believe him and credit Singler's testimony in this regard.

for Budweiser." Lux testified that Rimualdo responded, "No contract, no Bud." According to Lux, they talked awhile, then Lux jokingly said, "This looks like strike two," and they both laughed. Lux testified that strike one came from Rimualdo's comment in the grievance meeting. Strike two obviously referred to the Labatt's beer. After this comment, Rimualdo bought Lux a beer. Lux left for bowling shortly thereafter.

I have already indicated that I did not find Rimualdo credible. Based on testimony given in the next section of this decision, I do not find Lux credible either, except when his testimony is supported by other more credible witnesses.

The next day, Lux told other managers that he had seen Rimualdo at the tavern drinking Labatt's. He does not believe he told the managers about the two strike comment. Later, he saw Rimualdo in the office area. Rimualdo looked at him and said, "I'll deal with you later." Lux inquired what he was displeased about and Rimualdo said, "You got a big mouth. You told everybody." According to Lux, Rimualdo was upset about him telling people at the brewery that Rimualdo had been publicly drinking Labatt's. According to Lux, nothing in the conversation related to the grievance meeting or the strike two comment.

Silva testified that on this occasion, he overheard Rimualdo say to Lux, "I'll take care of you later." Lux asked what was his problem. Rimualdo replied, "The problem is that I'm drinking Labatt's beer down in the bar and, you're telling everybody about it." Silva came out asked Rimualdo if he was really drinking a competitor's beer in a bar. Rimualdo acknowledged that he was and that he could do whatever he wanted. Silva expressed his

displeasure at a Busch employee drinking a competitor's beer and the matter was dropped.

Following this incident, Rimualdo testified that he was referred to in the plant by supervisors Art Lux and Dan Robinson as "two strikes." Rimualdo believed this term referred to his filing of the grievance and the beer incident. Rimualdo testified that he had a conversation with Robinson in which Robinson asked, "When you go to a tavern or bar, what do you drink? What do you order?" Rimualdo replied, "Labatt's Blue." Robinson commented, "That just tells me what kind of person you are." Rimualdo testified that several times thereafter, Robinson and Lux referred to him as "two strikes." These references displeased Rimualdo.

Robinson testified that he heard that Rimualdo was drinking a competitor's beer from an office employee. About a week later, Robinson saw Rimualdo and asked what beer he drinks when he is at a tavern. According to Robinson, Rimualdo got defensive and said, "[I]t's none of your fucking business, pardon my language." And then added, "A Labatt's." Robinson replied, "That tells me a little bit about you." Robinson was unaware that Rimualdo had at any time filed grievances with Respondent. Robinson credibly denied having any knowledge about the one strike, two strike matter. Lux testified that no one at the plant called Rimualdo two strikes. He denied ever calling him by that name. Rimualdo could not remember any specifics about being called "two strikes" in the plant and I do not believe it occurred.[22]

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[22] Singler testified that Lux told him that he had called Rimualdo "two strikes" at a local tavern. He has not personally heard anyone call Rimualdo "two strikes." Harmon overheard the

3. Conclusion with respect to the two-strikes allegation

I credit Lux, Silva and Robinson to the extent their testimony differs from that of Rimualdo on the issue of "two strikes." Though Lux admitted the two strikes remark in the bar, strike one related to a remark made by Rimualdo in the grievance meeting. At that meeting Singler assured Rimualdo that there were no strikes against him for filing the safety grievances. The operative comment and the one which obviously rankled Rimualdo was the reference to the Labatt's beer in Lux's subsequent comments to other members of management. Rimualdo's conversation with Lux and Silva the next day clearly reveal that his anger stemmed from plant personnel being told that he was drinking a competitor's beer in public, obviously something frowned upon by the Busch corporate culture. In any event, I do not find that Lux's comment about two strikes in any way constitutes a threat over the filing of grievances. I believe the comment was, and I believe it clear that Rimualdo understood it to be, criticism for drinking a competitor's beer in public.

4. The Lux threat to Rimualdo for filing ULP charges

The Union filed a charge alleging that Rimualdo was threatened with discipline for filing the grievances. The complaint allegations discussed immediately above stem from that charge. The hearing on this complaint allegation

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Lux, Rimualdo and Silva conversation. He remembers it involving teasing Rimualdo about drinking a competitor's beer at a tavern. Prior to this conversation, Harmon had learned that Lux had seen Rimualdo drinking Labatt's in a local bar. He testified that he had heard nothing about "strikes." The word did not come up in this conversation nor did any mention of the filing of grievances. Harmon testified that he is on the plant floor at least once a week and has never heard Rimualdo referred to as "two strikes."

was originally set for hearing in September 1999. By August, it was known to Respondent and Lux that his two strike comment or comments were at the core of this issue.

On August 25, 1999, Rimualdo was working on a project with employees Art Alexander, Dwight Hart, and Supervisor Dan Tamulevich. The project required the employees to hand stamp dates on packages of beer. According to Rimualdo, Tamulevich was having a problem with a procedure necessary to complete the project. Rimualdo volunteered to complete the procedure. At this time, Art Lux came up to the group. According to Rimualdo, Lux looked at him and said, "You got to be careful what you say and what you do around this guy, he's bad news." Rimualdo at the time was working with ink, and there was ink on his hands. According to Rimualdo, Lux then said to him, "You got to be pretty good with having ink on your fingers." This comment referred to the fact that Rimualdo had recently been arrested at the brewery as a result of a domestic dispute with his ex-wife. This comment displeased Rimualdo.

Rimualdo then responded to Lux, saying, "I'm a good hearted guy." According to Rimualdo, Lux replied, "You're not a good hearted guy. You made it very tough for me, filing those charges with the NLRB. We'll see in September." The hearing on the NLRB charges was then set for September, but was postponed. Rimualdo described Lux as being mad and as further saying he would get even with him in some way. Rimualdo added that he did not discuss his marital problems with fellow employees and Lux's comments embarrassed him.

Lux denied Rimualdo's version of this meeting and testified instead that Supervisor Tamulevich handed Rimualdo a tool with ink on it and Rimualdo said, "I'm

used to the ink, so it's no big deal." According to Lux, everyone laughed.

Tamulevich testified that he was having a problem setting up the date stamp and asked Rimualdo to help. Doing so, Rimualdo got ink on his hands. According to Tamulevich, Rimualdo joked that he should be getting used to this. He testified that the group of employees chuckled because they know of Rimualdo's recent arrest at the plant. Tamulevich testified that Lux was present, but confined his comments to questions about how the employees were going to accomplish the date stamping problem. Tamulevich denied that Lux directed any comments specifically to Rimualdo, and specifically denied that Lux made any reference to the NLRB charges.

Dwight Hart has been employed by Respondent since 1983. He testified that he was working with Tamulevich and Rimualdo on the stamping project. He testified that Lux said, "You have the right guy on this job." Rimualdo asked, "What do you mean by that?" Lux said, "You should have a lot of experience with ink pads." As he said this, Lux made motions with his hands simulating the taking of fingerprints. According to Hart, Rimualdo looked uneasy. This prompted Hart to ask Lux, "Why do you pick on Joe? He is a pretty good hearted guy." Rimualdo said, "Yeah, I'm a good guy. I've got a big heart." According to Hart, Lux looked at Hart and said, "He's made trouble for me with the NLRB."

Art Alexander is a 16-year employee at Baldwinsville. He corroborated Hart's version of the ink comments. He testified that he left at that point because Rimualdo appeared upset and he felt uncomfortable.

Either Lux and Tamulevich or Hart, Alexander, and Rimualdo are lying. Though I still view Rimualdo's testimony with a great deal of skepticism, Hart and Alexander appeared totally truthful. They had nothing to gain and perhaps something to lose by testifying contrary to their supervisors. I credit them and thus Rimualdo in this instance. Neither Hart nor Alexander testified about the vague threat that Rimualdo testified that Lux directed at him after mentioning the NLRB charges. No one examined either witness about his omission in their testimony. Whether this was an omission on counsels' part or a conscious decision, I do not know. I will accept Rimualdo's testimony in this regard, however. I believe Tamulevich and Lux are lying about the incident. If there was no threat there was absolutely no reason to lie. I find therefore that Lux threatened Rimualdo for filing charges with the Board over Lux's conduct earlier in the year.

It is well settled that resort to the Board's processes and the filing of charges, regardless of whether they are ultimately meritorious, is concerted protected activity. *Braun Electric Co.*, 324 NLRB 1 (1997), citing, *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740 (1983), and *Roadway Express*, 239 NLRB 653 (1978) ("there can be no doubt that [filing charges] was protected by the Act."); *Equitable Gas Co.*, 303 NLRB 925, 936 (1991) (finding violation of Section 8(a)(1) where "threats were premised... on the protected activities of filing charges and giving attendant supporting testimony under the Act"). Threatening to "get" an employee because he/she engaged in such activity is therefore a threat of reprisal and violative of the Act. See, e.g., *Armstrong Rubber Co.*, 273 NLRB 233, 235 (1984); *Donahue Beverages, Inc.*, 1999 NLRB 681, 583 (1972). By threatening Rimualdo with unspecified retaliation for filing charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Anheuser Busch, Incorporated, of Baldwinsville, New York, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by:

(a) Refusing to allow a requested steward to represent an employee in violation of the employee's rights under Section 7 of the Act.

(b) Threatening to discharge an employee if he engaged in concerted protected activity, including speaking at corporate communication meetings.

(c) Threatening an employee with reprisal for filing charges with the National Labor Relations Board.

4. Respondent did not violate the Act in any other way alleged in the complaint.

5. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

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[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Anheuser Busch, Incorporated, Baldwinsville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow a requested steward to represent an employee absent extenuating circumstances, in violation of the employee's rights under Section 7 of the Act.

(b) Threatening to discharge an employee if he or she engages in concerted protected activity, including speaking at corporate communication meetings.

(c) Threatening an employee with reprisal for filing charges with the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Baldwinsville, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[24] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 7, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to allow a requested steward to represent an employee absent extenuating circumstances, in violation of the employee's rights under Section 7 of the Act.

WE WILL NOT threaten or discharge an employee if he or she engages in concerted protected activity, including speaking at corporate communication meetings.

WE WILL NOT threaten an employee with reprisal for filing charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ANHEUSER-BUSCH, INCORPORATED

APPENDIX C - ORDER OF THE NATIONAL LABOR RELATIONS BOARD GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION DATED JULY 5, 2002

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other fomal errors so that corrections can be included in the bound volumes.

Anheuser-Busch, Incorporated ***and*** **International Brotherhood of Teamsters, Local Union No. 1149.**
Cases 3-CA-21796, 3-CA-21906, and 3-CA-22112

July 5, 2002

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR RECONSIDERATION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On December 19, 2001, the National Labor Relations Board issued a Decision and Order in this case reported at 337 NLRB No. 2 (2001). The Board adopted an administrative law judge's decision that the Respondent violated Section 8(a)(1) of the Act by refusing to permit employee Patrick Lamirande his choice of steward at two disciplinary meetings; by threatening to discharge employee Brian Meany for engaging in protected speech at one of the Respondent's corporate communications meetings; and by threatening employee Joseph Rimualdo with reprisal for filing charges with the Board. Remedially, the Board ordered the Respondent to cease and desist from its unlawful conduct and to post a notice.

On January 16, 2002, the Respondent filed a motion for reconsideration of the Board's decision. In its motion, the Respondent seeks correction of an erroneous citation in the judge's decision and two modifications to the language of the notice. The Respondent also argues, with regard to the merits of the underlying decision, that the Board erred in its decision to adopt the judge's findings that the Respondent had violated the Act. The General Counsel and the Charging Party each filed reply briefs.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.[1]

With regard to the merits of the underlying decision, the Respondent's Motion reiterates the arguments previously considered and rejected by the Board. Accordingly, this portion of the Respondent's Motion is denied as raising nothing not previously considered and as lacking in merit.

The Respondent also seeks correction of two inadvertent errors by the Board and the judge. We grant that portion of the Motion and make the following modifications.

(1) In reproducing the judge's decision, present references to *Kidde Inc.*, in the paragraph beginning at the bottom of the right column on page 5, were incorrectly substituted for *GHR Energy Corp.*, 294 NLRB 1011 (1989), in the original judge's decision. The published judge's decision is corrected so that it appears as written when the judge issued the decision. See 337 NLRB No. 2, slip op. at 5.

(2) The language of the Board's and the judge's notice failed to conform to the language of his recommended

[1] Member Bartlett did not participate in the underlying case.

Order, which was adopted by the Board. The attached corrected notice which has also been modified with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001), should be substituted for the notice attached to the Board's decision.

(3) The Respondent also argues that the Order and notice provisions regarding employee Brian Meany are overbroad and could be interpreted as encompassing unprotected activity at corporate communications meetings. Upon consideration of the Respondent's arguments, we shall grant that portion of the Respondent's motion and make appropriate modifications to the Board's Order.[2]

ORDER

It is ordered that the Board's Order in the underlying decision (337 NLRB No. 2) is modified, and the Respondent, Anheuser-Busch, Inc., Baldwinsville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1 (b).

"(b) Threaten to discharge an employee if he or she engages in concerted protected activity, including engaging in such activity when speaking at corporate communications meetings."

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[2] The General Counsel argues that because the Respondent did not file exceptions to the notice and order as they appeared in the judge's decision, the Respondent has waived its right to present this third argument. We disagree. It is well established that the Board has full authority over the remedial aspects of its decisions, even in the absence of exceptions. See *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996).

2. Substitute the attached notice to employees for that which issued on December 19, 2001.

IT IS FURTHER ORDERED that the Respondent's motion for reconsideration of the Board's Decision and Order is denied in all other respects.

Dated, Washington, D.C., July 5, 2002

Peter J. Hurtgen, Chairman
Wilma B. Liebman, Member
Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to allow a requested steward to represent an employee absent extenuating circumstances, in violation of the employee's rights under Section 7 of the Act.

WE WILL NOT threaten to discharge an employee if he or she engages in concerted protected activity, including engaging in such activity when speaking at corporate communication meetings.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ANHEUSER-BUSCH, INCORPORATED

APPENDIX D - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED SEPTEMBER 29, 2003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 29, 2003

No. 02-1740
3-CA-22112
3-CA-21906
3-CA-21796

ANHEUSER-BUSCH, INCORPORATED
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

No. 02-1897
3-CA-22112
3-CA-21906
3-CA-21796

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

ANHEUSER-BUSCH, INCORPORATED
Respondent

On Petition for Rehearing En Banc

Anheuser-Busch, Incorporated's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for the En Banc Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AUGUST 1, 2003

JUDGMENT

FILED: August 1, 2003

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 02-1740
3-CA-22112
3-CA-21906
3-CA-21796

ANHEUSER-BUSCH, INCORPORATED
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

NO. 02-1897
3-CA-22112
3-CA-21906
3-CA-21796

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

ANHEUSER-BUSCH, INCORPORATED
Respondent

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

In accordance with the written opinion of this Court filed this day, the Court denies the petition for review and grants the cross application for enforcement.

/s/ Patricia S. Connor
CLERK

APPENDIX F - STATUTORY AND REGULATORY PROVISIONS

29 U.S.C. § 151

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 157

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer – –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Supreme Court, U.S.
FILED
MAR 5 - 2004
OFFICE OF THE CLERK

No. 03-949

In the Supreme Court of the United States

ANHEUSER-BUSCH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices by conducting investigatory interviews of an employee after denying his request for the presence of a particular union shop steward and summoning instead a union shop steward selected by petitioner.

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In the Supreme Court of the United States

No. 03-949

ANHEUSER-BUSCH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 338 F.3d 267. The decision and order of the National Labor Relations Board (Pet. App. A38-A40), and the decision of the administrative law judge (Pet. App. A41-A88), are reported at 337 N.L.R.B. 3. The Board's order denying petitioner's motion for reconsideration in part (Pet. App. A89-A93) is reported at 337 N.L.R.B. 756.

JURISDICTION

The judgment of the court of appeals (Pet. App. A96-A97) was entered on August 1, 2003. A petition for rehearing was denied on September 29, 2003 (Pet. App. A94-A95). The petition for a writ of certiorari was filed on December 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held, in agreement with the National Labor Relations Board (Board), that NLRA Section 7 "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. at 256. The Court therefore upheld the Board's conclusion that an employer violates NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1), by conducting such an "investigatory" interview after denying an employee's request that his union representative be present at the interview. 420 U.S. at 252.[1]

Weingarten itself involved an employee who requested that "a shop steward be called to the interview," 420 U.S. at 255, and this Court therefore did not address how the right recognized in that case would apply where the employee requests the presence of a particular union representative from among several potential representatives. The Board has explained that "[t]he selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the

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[1] Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, 29 U.S.C. 157.

selected representative is available at the time of the [investigatory] meeting." *Barnard College*, 340 N.L.R.B. No. 106 (Oct. 21, 2003), slip op. 2 (citing Pet. App. A38-A88; *Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143 (1981)).

2. Petitioner operates a brewery in Baldwinsville, New York. Pet. App. A3, A42. The production employees at that facility are represented for purposes of collective bargaining by the International Brotherhood of Teamsters (Union). *Ibid.* On December 15, 1998, Patrick Lamirande, a production operator, allegedly obstructed work being performed in the plant by an independent contractor. *Id.* at A4, A46. The following day, December 16, at approximately 11:15 a.m., Lamirande was approached by Mark Burlingame, a supervisor in Lamirande's department, who began questioning him about the contractor's allegations. *Id.* at A4-A5, A46-A47. At that time, two Union shop stewards were on duty at the plant, Dan Finn and Fred Vogel. *Id.* at A5, A46. Lamirande asked Burlingame to summon Finn. *Id.* at A5, A47, A52. When Lamirande made that request, Finn was on lunch break, which was due to end in about 15 minutes, *i.e.*, at 11:30 a.m. (*id.* at A47, A59; see *id.* at A5) and Vogel was at work in another part of the plant. *Id.* at A5, A14, A48 & n.6; see also *id.* at A60.

Because Finn was on his lunch break, Burlingame denied Lamirande's request and summoned Vogel instead. Pet. App. A5, A47, A52, A59. At about 11:25 or 11:30 a.m., Vogel heard his name being spoken on his radio, and a supervisor appeared and escorted him to meet with Burlingame and Lamirande. *Id.* at A48 n.6; see *id.* at A5. When Vogel arrived, Lamirande told him, "No offense against you Fred, but I would like to see Dan Finn because he is aware of my situation." *Id.*

at A48. Vogel then requested Burlingame to summon Finn. *Id.* at A5, A48. Burlingame declined, stating that "Vogel was there and they were going to proceed." *Id.* at A48. When Lamirande refused to answer questions without the presence of Finn, Burlingame sent him home for the remainder of the day. *Id.* at A5, A49.

The following day Lamirande was ordered to report to Burlingame's office for a meeting with management. Pet. App. A5, A50. Before the meeting, Lamirande ran into Howard Ormsby, a Union business agent, in the plant. Lamirande informed Ormsby about his predicament and told Ormsby that he wanted Finn to be at the upcoming meeting. *Id.* at A50. Lamirande and Ormsby then went to Burlingame's office, where they met with Vogel, Burlingame, and Ken Silva (an assistant manager). *Id.* at A5, A50-A51. Ormsby requested that Finn be present at the meeting, but Silva replied that Finn "would not be called." *Id.* at A5, A51. Lamirande was questioned about the contractor's allegations; Ormsby and Vogel participated and represented Lamirande. *Ibid.* At the conclusion of the meeting, Burlingame told Lamirande that he had no defense to the contractor's allegations and that he would be disciplined. *Ibid.*

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging, in relevant part, that petitioner violated NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1), by conducting investigatory interviews of Lamirande on December 16 and 17, 1998, after having denied his request for representation by Union shop steward Finn. See Pet. App. A41, A44.[2]

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[2] As a result of the contractor's allegations, petitioner (as Burlingame promised) disciplined Lamirande by suspending him for two weeks. Pet. App. A46. The General Counsel did not challenge

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. A59-61; see *id.* at A85. Based on his examination of Board precedent, the ALJ concluded that, "in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." *Id.* at A59. Applying that principle, the ALJ found that, on December 16, 1998, Lamirande made a request for representation by Finn at an investigatory interview with Burlingame, and that there were "no * * * extenuating circumstances" justifying Burlingame's failure to summon Finn. *Ibid.*; see *id.* at A52. The ALJ explained that "[t]he only reason advanced [by petitioner] for not calling Finn" on December 16 was that Finn was at lunch. Pet. App. A59. However, the ALJ found that when Burlingame confronted Lamirande at approximately 11:15, "Finn's lunch break only had 15 minutes to go," and that "[t]here was nothing about the [contractor's] allegations against Lamirande that demanded instant attention." *Ibid.* The ALJ further found that Finn's being on lunch break did not render him less "available" than Vogel to represent Lamirande. *Id.* at A60. Rather, the ALJ found that neither Vogel nor Finn was "present when Lamirande requested Finn," and the ALJ credited Finn's testimony that he "had been called away from breaks on previous occasions to represent employees." *Id.* at A59, A60.

As to the investigatory interview of December 17, 1998, the ALJ found that, prior to that meeting, Union business agent Ormsby "voiced" Lamirande's "clear"

Lamirande's suspension before the Board, see *ibid.*, and the legality of the suspension is not before this Court.

request for Finn from the previous day and that "[n]o special or extenuating circumstances" justified petitioner's failure to summon Finn. Pet. App. A60. The ALJ found that Finn was "clearly available" to represent Lamirande on December 17. *Id.* at A61. The ALJ rejected petitioner's contention that its refusal to summon Finn was justified because Lamirande received "adequate representation" from Vogel and Ormsby at the December 17 meeting. *Id.* at A60. The ALJ concluded, instead, that the decision as to who would represent Lamirande "was for the union officials to make." *Ibid.*[3]

b. The Board affirmed the ALJ's findings and conclusions. Pet. App. A38-A39. The Board ordered petitioner, in relevant part, to cease and desist from "[r]efusing to allow a requested steward to represent an employee absent extenuating circumstances" at the Baldwinsville plant. *Id.* at A39, A86.[4]

4. A divided panel of the court of appeals enforced the Board's order. Pet. App. A3, A25. The court upheld, as reflecting "a reasonable interpretation and application of the [NLRA]," the Board's rule that "absent extenuating circumstances, an employee subjected

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[3] Petitioner also sought to justify its failure to summon Finn on December 17 on the ground that Vogel "had represented Lamirande the previous day and was 'up to speed.'" Pet. App. A60. The ALJ rejected that argument. He found (among other things) that "nothing was developed in the first meeting [*i.e.* on December 16] that would have brought Vogel 'up to speed,'" given that Lamirande had refused to answer Burlingame's questions on December 16 in the absence of Finn. *Id.* at A60-A61.

[4] Petitioner filed a motion for reconsideration with the Board. Pet. App. A90. The Board denied that motion in pertinent part because petitioner "reiterate[d]" arguments that the Board had already "considered and rejected." *Ibid.*

to an employer's investigation has the right to specify the union representative of his choice." *Id.* at A11, A12. Guided by this Court's decision in *Weingarten*, the court of appeals explained that "the right to union representation 'plainly effectuates the most fundamental purposes of the [NLRA],' which is to enable workers to seek mutual aid and protection without undue interference by their employers." *Id.* at A12-A13 (quoting 420 U.S. at 262). The court concluded that "[t]he choice of a representative plainly furthers the ability of workers to seek such aid and protection." *Id.* at A13.

The court further explained that, "[w]hen an employee requests union representation in an investigatory interview, the employee is seeking assistance to deal with a 'confrontation with his employer.'" Pet. App. A13 (quoting *Weingarten*, 420 U.S. at 260). The court concluded that, "[i]n such a confrontation, the employee is generally at some disadvantage, and the recognition of his right to choose his representative serves, to some extent, to mitigate this inequality." *Ibid.* The court also observed that the Board's rule is consistent with the purpose of the NLRA "to protect 'the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing.*'" *Id.* at A12 (quoting 29 U.S.C. 151).

The court concluded that the rule applied by the Board in this case is consistent with prior Board decisions. See Pet. App. A16-A19. The court noted that, in earlier precedent, the Board "had firmly indicated that, so long as the requested union representative is reasonably available, an employer should accommodate an employee's request for a particular representative." *Id.* at A17-A18 (discussing *GHR Energy Corp.*, 294

N.L.R.B. 1011 (1989)). The court further concluded that, in earlier precedent, "the Board had taken a firm position that, absent special circumstances * * * the choice as to who will represent an employee during an investigatory interview resides with the union and the employee, not the employer." *Id.* at A19 (discussing *New Jersey Bell Telephone Co.*, 308 N.L.R.B. 277 (1992)).

The court also concluded that, in the circumstances of this case, "the ALJ did not err in deciding that [petitioner] should have given Lamirande access to the representative of his choice," *i.e.*, Union steward Finn. Pet. App. A14-A15. In particular, the court found sufficient evidentiary support for the ALJ's finding that Finn was no less available than Vogel to represent Lamirande on December 16, 1998. *Id.* at A14-A15 & n.14; see *id.* at A20 n.19 (upholding Board's unfair labor practice finding as to the December 17, 1998 investigatory meeting).[5]

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court upheld the Board's view that NLRA Section 7 affords employees the general right to request the presence of a union representative at an investigatory interview. Subsequently, the Board established principles to govern the situation in which

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[5] Judge Shedd dissented in relevant part. Pet. App. A25-A37. The dissent primarily argued that, in enforcing the Board's order, the panel majority "impermissibly expand[ed] the right first announced" by this Court in *Weingarten*. *Id.* at A26.

the employee under investigation requests the presence of a particular union representative from among several potential representatives. The Board has held that an employee is entitled "to specify the union representative he want[s] to assist him at the [investigatory] interview," *GHR Energy Corp.*, 294 N.L.R.B. 1011, 1042 (1989), but may not insist on the presence of a representative who is not "readily available," *Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143, 1143 (1981). Similarly, the Board has concluded that, when two union officials are "equally available" to serve as a *Weingarten* representative, "the decision as to who will serve is properly decided by the union officials," *New Jersey Bell Tel. Co.*, 308 N.L.R.B. 277, 282 (1992), but the employer may "establish special circumstances that would warrant precluding one of the two officials from serving," *ibid.*; see *Barnard College*, 340 N.L.R.B. No. 106 (Oct. 21, 2003), slip op. 2 ("The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the [investigatory] meeting.") (citing Pet. App. A38-A88; *Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143 (1981)).

b. This Court has "often reaffirmed" that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,' * * * and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 568 (1978)). Moreover, the task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place

is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). See *Weingarten*, 420 U.S. at 266-267.

In this case, the court of appeals properly afforded deference to the Board's determination that, under Section 7, an employee who is subjected to an investigatory interview is entitled to select from among equally available union representatives absent extenuating circumstances. Pet. App. A11-A15; see Pet. App. A59-A60; *New Jersey Bell Telephone Co.*, 308 N.L.R.B. at 282. That determination is a reasonable interpretation of Section 7 because it strikes a fair balance among the competing interests with respect to investigatory interviews. Where, as here, more than one union representative is equally available, permitting an employee to specify the union representative he wishes to have present at the investigatory interview in the absence of extenuating circumstances reasonably accommodates both the target employee's interest in acting in concert with others for "mutual aid or protection," 29 U.S.C. 157, when facing possible adverse disciplinary action, and the employer's interest in promptly investigating allegations of employee misconduct. Having concluded that the Board's interpretation is reasonable (Pet. App. A12), the court of appeals correctly deferred to the Board's view. See *id.* at A11 n.10, A15 n.15.[6]

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[6] Petitioner repeatedly characterizes the Board's interpretation in this case as constituting a "new" rule. See, *e.g.*, Pet. 7, 8, 10. As discussed pp. 8-9, *supra*, that characterization is incorrect. Rather, as the court of appeals properly concluded, the Board's decision is

The facts in this case illustrate the reasonableness of the Board's interpretation. Neither Finn nor Vogel was present when Lamirande initially requested representation by Finn: Vogel was in another part of the brewery and had to be summoned by radio, and Finn was on his lunch break. Pet. App. A14, A47. Finn, however, would have completed his lunch break within fifteen minutes (roughly the same amount of time it took Vogel to arrive on the scene) and, in any event, Finn had circumscribed his lunch break on previous occasions in order to represent employees. *Id.* at A14, A47, A48 n.6. Given these facts, and the fact that the allegations against Lamirande did not mandate immediate attention, *id.* at A14 n.14, A59, the Board reasonably determined that petitioner could not deny Lamirande the opportunity to select Finn as his representative because Finn was not "any less 'available' than Vogel." *Id.* at A14, A60.[7]

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rooted in Board precedent, see Pet. App. A16-A19, and "does not signify a substitution of new law for old law," *id.* at A20. Indeed, for those reasons, the court rejected petitioner's claim that the Board was applying a new rule "retroactive[ly]" to this case. *Id.* at A19. In this Court, petitioner does not challenge the court of appeals' ruling on the retroactivity issue.

[7] Petitioner maintains that "[t]he Board's claim that an employee who is at lunch and an employee who is on the job are 'equally available' from the perspective of a front-line supervisor suggests a disconnect between its decision and the realities of the workplace." Pet. 14 n.6. In the court of appeals, however, petitioner did not claim that "substantial evidence fails to support" the ALJ's finding that "the fact that Finn was [at lunch] for a short period of time [did not make] him any less 'available' than Vogel." Pet. App. A14-A15 n.14. In any event, insofar as petitioner now objects to this factual finding, petitioner's claim does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. In this Court, petitioner's primary contention (Pet. i (Question 1), 7-12) is that the Board's interpretation is contrary to NLRA Section 7 and *Weingarten*. That contention lacks merit.

a. Petitioner first asserts (Pet. 7) that the Board's determination that the employee's choice of a representative need not be given effect where there are extenuating circumstances constitutes an impermissible interference with "legitimate employer prerogatives," *Weingarten*, 420 U.S. at 258, because the "extenuating circumstances" exception "transform[s] every legitimate business decision to refuse a specific representative into an opportunity to litigate whether * * * the business rationale was extenuating enough." This argument is based on a mischaracterization of the approach followed by the Board, which amply accommodates the employer's legitimate prerogatives.

As the Court explained in *Weingarten*, the right of employees upheld in that case did not "interfere with legitimate employer prerogatives" because the employer is free to "leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one." 420 U.S. at 258. As the court of appeals explained, employers have the same prerogatives under the Board's interpretation at issue here: "The employer may deny an employee's request for a particular representative, forego the interview process, and render a decision based on the information it has already obtained." Pet. App. A13-A14 n.12. Moreover, as the court correctly observed, under the Board's interpretation, in the event of "extenuating circumstances," the employer "may reject the employee's request and proceed accordingly." *Ibid.* In light of those considerations, the court

was satisfied that, as in *Weingarten*, the Board's construction of Section 7 does not "plac[e] an undue burden on employers." *Ibid.*

Contrary to petitioner's suggestion (Pet. 7), the fact that litigation might ensue should an employer seek to invoke the "extenuating circumstances" exception is not a basis for invalidating the Board's interpretation. The "extenuating circumstances" that permit the employer to select the employee's representative constitute a narrow exception to the general rule that the selection from among readily available representatives "belongs to the employee and the union." *Barnard College*, *supra*, 340 N.L.R.B. No. 106, slip op. 2; see Pet. App. A60. The Board does not act improperly by providing the employer with an *exemption* from an otherwise reasonable rule if the employer can prove that it is entitled to the exemption on the facts of a particular case. See *New Jersey Bell Tel. Co.*, 308 N.L.R.B. at 282 (finding that "special circumstances" existed where the employer selected one union official over another equally available official who had "exceeded the permissible role of a *Weingarten* representative" during an earlier investigatory interview).

b. Next, petitioner contends (Pet. 8-9) that the Board's construction is inconsistent with *Weingarten* because the Court in that case held that Section 7 entitles an employee only to the assistance of "[*a*] knowledgeable union representative" at an investigatory interview, whereas "having *a* 'knowledgeable' union representative, even if not preferred, is not the equivalent of being subjected to an interview without any representative." That contention, however, is based on a misreading of *Weingarten*. Nothing in *Weingarten* supports petitioner's assumption that it is the employer's prerogative to specify which of two avail-

able union representatives should act as the employee's representative. The *Weingarten* Court explained that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [NLRA] was designed to eliminate." 420 U.S. at 262. The Court further observed that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. Contrary to petitioner's suggestion, nothing in *Weingarten* implies, much less states, that Section 7 forecloses an employee from requesting the presence of a particular "knowledgeable union representative" at the investigatory interview. And there is certainly nothing in *Weingarten* which grants the *employer* (rather than the employee and his union) general authority to decide who among several equally available candidates qualifies as "a knowledgeable union representative" with respect to a given investigatory interview.

Petitioner is also mistaken in suggesting (Pet. 8-9 n.2) that the court of appeals' decision in this case is contrary to decisions of other circuits. Petitioner asserts that some courts of appeals have held that the Board lacks authority to adopt any interpretation of Section 7 rights in the context of investigatory interviews that "expand[s] upon the *Weingarten* right." Pet. 9. However, the cases on which petitioner relies contain no such holding and do not address the scope of the Board's Section 7 authority. Rather, in the cited cases, the courts simply found that the employer did not commit an unfair labor practice under the principles

articulated by the Board and upheld by the Court in *Weingarten*.[8]

c. Nor is there any merit to petitioner's contention (Pet. 10) that the Board's rule is invalid because it "is not grounded in Section 7 of the [NLRA]." Section 7 grants employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. An employee's effort to obtain the assistance of his union representative at a confrontation with his employer "clearly falls within the literal wording of [Section] 7." *Weingarten*, 420 U.S. at 260. That is equally true whether the employee makes a general request for a union representative, as in *Weingarten*, or a request for a specific union representative, as in this case. In either situation, the employee's request is "concerted" because he seeks to act together with his collective representative. See *Epilepsy Found.* v. *NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001) (noting that "an employee's request for union representation during an investigatory interview is undoubtedly concerted activity"), cert. denied, 536 U.S. 904 (2002). And, in either situation, such concerted

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[8] See *Southwestern Bell Tel. Co.* v. *NLRB*, 667 F.2d 470, 472-474 (5th Cir. 1982) (finding that, at the investigatory interview, the employer properly directed the union representative not to answer questions put to the employee); *Spartan Stores, Inc.* v. *NLRB*, 628 F.2d 953, 957-959 (6th Cir. 1980) (finding that the employer properly discharged an employee for insubordination where the employee, who had no reasonable basis for believing that the interview might result in discipline, left the room to locate a union steward); *Climax Molybdenum Co.* v. *NLRB*, 584 F.2d 360, 362-363, 365 (10th Cir. 1978) (finding that, under the circumstances, the employer properly denied the union representative's request to meet with employees on company time prior to the investigatory interview).

activity is also for the purpose of "mutual aid or protection," because "[t]he representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." *Weingarten*, 420 U.S. at 261.

Petitioner nonetheless contends (Pet. 11) that Lamirande's request for the assistance of steward Finn in this case did not fall within the scope of Section 7 because Lamirande based his request merely on a "personal preference" for Finn. That argument, however, rests on an erroneous factual premise. Although Lamirande testified at the administrative hearing that he "personally believed Finn to be a better steward" than Vogel (Pet. App. A46), Lamirande told Vogel at the December 16, 1998 investigatory interview that he preferred to be represented by Finn on that occasion because Finn "is aware of my situation" (*id.* at A48), *i.e.*, because Finn was familiar with the facts surrounding the contractor's misconduct allegations (see *id.* at A13 n.11). Moreover, on both December 16 and 17, 1998, the Union itself (through steward Vogel and business agent Ormsby, respectively), after consulting with Lamirande, reaffirmed Lamirande's request that petitioner summon Finn, thereby manifesting the Union's judgment that Finn was best positioned to represent Lamirande. See *id.* at A5, A48, A50-A51. In any event, for the reasons we have discussed, an employee's request for the presence of a particular equally available union representative at an investigatory interview would constitute Section 7 "concerted activit[y] for the purpose of * * * mutual aid or protection" even if based on the employee's personal belief that the requested representative is the better of two stewards in the shop.

3. Finally, petitioner contends (Pet. 12-15) that the Board's decision in this case is inconsistent with its own precedent. The court of appeals properly rejected that argument. See Pet. App. A16-A19. Although petitioner relies primarily on *Pacific Gas & Electric Co.*, 253 N.L.R.B. 1143 (1981), and *Williams Pipeline Co.*, 315 N.L.R.B. 1 (1994), in support of its claim, see Pet. 12-13, 14, 15, neither case establishes a flat rule that an employer is free to disregard an employee's request for the presence of a particular *Weingarten* representative at an investigatory interview.

In *Pacific Gas & Electric*, the Board concluded only that the employer is not required to honor an employee's request for a union representative "who is not readily available and who does not normally represent employees at that location." 253 N.L.R.B. at 1143. The Board found that the employer in that case acted lawfully in providing another steward who was "ready, willing, able, and present" at the plant, rather than delaying the interview while summoning the requested steward, who worked off-site at another facility. *Id.* at 1143-1144. Given the ALJ's unchallenged finding that Finn and Vogel were equally available to represent Lamirande (Pet. App. A60), no comparable circumstances obtain in this case.[9]

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[9] Thus, Finn normally represented employees at the Baldwinsville plant, did not work at an off-site facility, and was "readily available," *Pacific Gas & Elec.*, 253 N.L.R.B. at 1143, to represent Lamirande on both December 16 and 17, 1998. With respect to December 16 in particular, Finn would have arrived on the scene of Lamirande's interview within 15 minutes, or sooner, had petitioner summoned Finn from his break by radio, as it had done in the past with respect to investigative interviews. For his part, Vogel was not "ready * * * and present," *id.* at 1144, to represent Lamirande when Burlingame initially confronted Lamirande, nor

Likewise, in *Williams Pipeline*, the Board concluded that, where the employee requested the presence of the only steward assigned to the plant, and that steward was unavailable and could not be reached by telephone, the employer acted unlawfully by forcing the employee to submit to an investigatory interview with a fellow employee (who was not a union representative) serving as a witness. 315 N.L.R.B. at 5. That holding is not inconsistent with the Board's decision in this case. In *Williams Pipeline*, the Board also stated (consistent with *Pacific Gas & Electric*) that an employer is not required to "postpone an investigatory interview with its employees because a *particular* union representative is unavailable for personal or other reasons, when another union representative is available and could have been requested by the employee." 315 N.L.R.B. at 5. Here, on December 16, 1998, Finn was not "unavailable" and Vogel "available" to represent Lamirande; rather, Finn was equally available as Vogel for that purpose. See Pet. App. A60; note 9, *supra*. Moreover, Finn was "clearly available" to represent Lamirande on December 17. Pet. App. A61.

Petitioner also cites *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276 (1977), and *LIR-USA Manufacturing Co.*, 306 N.L.R.B. 282 (1992), in support of its contention that an employer has no legal obligation to honor an employee's request for the presence of a specific union representative at an investigatory interview. Pet. 13. Those decisions, however, stand only for the

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was Vogel "ready and present" any sooner than Finn would have been. Rather, Vogel took 15 minutes to arrive at the scene of the interview because he was working in another part of the plant and had to be located by a supervisor and escorted to the interview. See Pet. App. A5, A14-A15, A46-A48, A59-A61.

proposition that an employer is not obligated to honor an employee's request for a specific union representative who is unavailable. See *Coca-Cola Bottling*, 227 N.L.R.B. at 1276 (finding unavailability where the requested union steward was on vacation and not due back for three days); *LIR-USA*, 306 N.L.R.B. at 305 (noting General Counsel's concession that "by providing Starken [a union shop steward], who was available, instead of Monahan [a union business agent], who was not readily available, [the employer] fulfilled its obligation to provide Jansen [the employee] with union representation"). See Pet. App. A19 n.18. In any event, as the court of appeals properly concluded (Pet. App. A16, A19), even if prior Board decisions "arguably support the contention that an employee is not entitled to the union representative of his choice" in the circumstances presented here, the Board subsequently "modified and reformed its standards on the basis of accumulating experience." That type of "evolutionary process" in the formulation of Board rules is, as the court noted, specifically authorized by *Weingarten* itself. *Id.* at A16 (quoting 420 U.S. at 265). See 420 U.S. at 265-266 (explaining that "[t]o hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking").[10]

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[10] Further review is not warranted in this case for the additional reason that it is unclear whether the issues presented to this Court by petitioner arise "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). At some point after the events here, but prior to the administrative hearing before the ALJ, petitioner and the Union reached a "mutual agreement" in which (as described by the ALJ) petitioner "will honor an employee's request for a specific [Union] representative if that person is available" with respect to future

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004

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investigatory interviews. Pet. App. A45; see *id.* at A15 n.15, A53. Although the parties were unwilling to settle the instant case (*id.* at A45), their agreement suggests that this case is of "isolated significance" and therefore inappropriate for certiorari. *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 76 (1955).

(3)

Supreme Court, U.S.
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No. 03-949

In the
Supreme Court of the United States
October Term, 2003

ANHEUSER-BUSCH, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Anheuser-Busch, Inc. ("ABI") submits this reply brief to respond to a single point raised in the Brief for the National Labor Relations Board In Opposition to ABI's petition for certiorari, namely that the issue presented is insubstantial.

In a footnote at the end of its Opposition, the National Relations Board ("Board") submits to the Court that further review is not necessary in this case because "it is unclear whether the issues presented to this Court by petitioner arise 'in the context of meaningful litigation.'" Opp., p. 19 n.10 (citing *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959)). However, the issues raised in the Petition are in no way moot. The Board continues to hold ABI accountable for an alleged violation of Section 8(a)(1) of the National Labor Relations Act, and ABI continues to assert that it did not violate the law when it provided a *Weingarten* representative to employee Patrick Lamirande, although not Lamirande's preferred representative. Resolution of the issue in this case, whether by this Court or by the Court of Appeals for the Fourth Circuit if review is denied, will determine the scope of the *Weingarten* right for all employers with union-represented employees.

Apparently recognizing the far-reaching impact of its rule, the Board attempts to portray its decision here as a minor gloss on the *Weingarten* rule. But its own explanation for the result reached in this case reveals the contrary. First, the Board explains the issue away by confusing the issue presented in this case, whether an employee is

entitled as a matter of federal labor law to a particular *Weingarten* representative, with the right of the union under Section 8(a)(5) to select its own representative. The Board argues that it is the right of the union to determine who will serve as representative when two stewards are available (Opp., p. 9), but the issue the administrative law judge thought he was deciding was the "limits of an *employee's* rights under *Weingarten*."[1] (A-53) (emphasis added).

More importantly, the Board's decision will complicate what historically has been a straightforward rule in application, but without identifying any policy reward. As to every request for a particular *Weingarten* representative, a manager will have to determine whether the requested representative is "available" and whether extenuating circumstances warrant rejecting the request. Opp., p. 9. If a manager determines that the requested representative is unavailable and offers a different representative, the manager runs the risk of having the Board determine after-the-fact that the interview should have been postponed until the requested representative became available. The Board does not dispute that its decision here may result in increased litigation in this regard, but

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[1] The Board cites to *Barnard College*, 340 NLRB No. 106 (Oct. 21, 2003), as stating that it is the right of *both* the union and the employee to select the representative, thereby mooting *Weingarten* and its progeny.

claims that such litigation results only from the fact that the question of exceptional circumstances is a "narrow exception." Opp., p. 13. The Board simply misses the point. As articulated by the Court, the *Weingarten* right is easy for managers to apply with little interference with management prerogatives to investigate employee misconduct. The Board's willingness to complicate that scheme without any good statutory basis for doing so will disrupt rather than further labor-management relations. And, still, the Board never explains the importance of having an employee represented by the particular representative of his choice.

Finally, the Board suggests that if an employer does not like its new rule, it can forego an investigatory interview altogether. Opp., p. 12. That ignores the realities of the workplace. In a unionized environment, decisions to discipline or discharge an employee for misconduct often must be based upon "just cause." Employers bear the burden of proof at arbitration that the employee engaged in the alleged wrongdoing, and the employer's unwillingness to learn an employee's version of events could be viewed by an arbitrator as an unreasonable investigation into the alleged misconduct. Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, pp. 905, 919 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

CONCLUSION

For the reasons set forth above and in its Petition, ABI respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,
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